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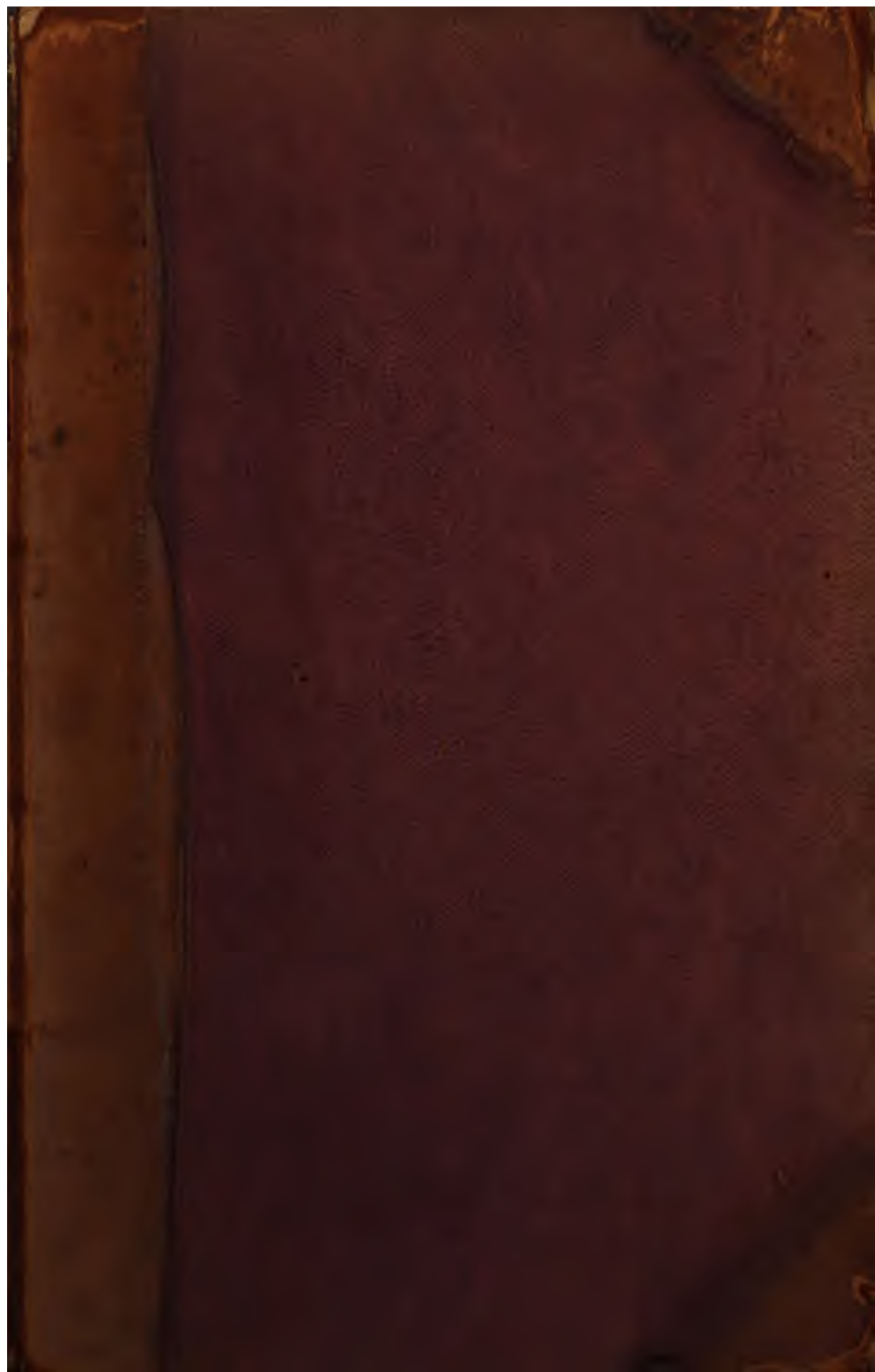
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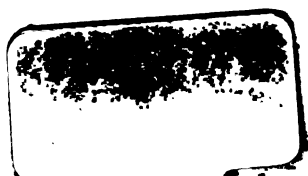


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Bombay High Court Reports.

VOLUME IX.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

1872.

EDITED BY

CHARLES F. FARRAN, B.A.,
(of the Middle Temple,)
BARRISTER-AT-LAW.

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VISHNU GHANASHA'M, VAKIL, HIGH COURT.



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DECIDED IN THE

HIGH COURT OF BOMBAY.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 117 of 1871.

1872.
Feb. 5.

LAKSHMIBA'I, widow, and another ...*Appellants.*

HARI bin RA'VJI*Respondent.*

Ejectment Suit by Landlord—Failure to prove lease—General title—Case put forward in plaint—Alternative case—Amendment of plaint.

Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease.

A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise.

Where the plaintiff has not put forward an alternative case in the plaint, he may have leave to amend his plaint and to state his case correctly therein, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátára, in Regular Appeal No. 127 of 1870, confirming the decree of the Subordinate Judge of Karár.

1 H C

1872. The following are the facts of the case :—

LAKSHMI-
BA'I
r.
HARI bin
RA'VJI.

The plaintiffs, Lakshmi-bái and Lakshuman, instituted this suit on the 10th January 1867 in the Court of the Munsif of Karár in the Sátára District. They alleged in the plaint that they were the *Inámdárs* of the lands therein described; that the defendant, Rávji bin Bháguji, was their tenant under an agreement No. 3, dated the 20th June 1861; and that he would neither pay rent nor vacate the lands, and therefore prayed that the said defendant might be directed to deliver up possession of the lands and pay the rent due.

The defendant denied the execution of the agreement of June 1861, and set up two other agreements, Nos. 7 and 8, dated respectively October 1848 and June 1852, passed by him to Durgo Balvaut, husband of the first, and father of the second plaintiff, and contended that, according to the terms of these documents, he had become a perpetual tenant of the lands in question, liable only to a rental of Rs. 35 per annum.

The Munsif found at first that the agreement No. 3 was proved, but on remand from the Court of Regular Appeal, he came to a different conclusion, and rejected the plaintiffs' claim. The District Judge on a second appeal affirmed this decree, he being also of opinion that the plaintiffs' lease No. 3 was not proved, and that the defendant's leases, Nos. 7 and 8, were proved.

A special appeal having been preferred and registered, it came on for hearing on the 14th August 1871 before GIBBS and WEST, JJ.

Shántarám Náráyan for the appellants.—The Lower Court dismissed the appellants' claim solely upon the ground that the agreement No. 3 was not proved; but, this being an action of ejectment, the Court ought to have determined whether, apart from the agreement, the appellants' title to eject the respondent, or to recover rent from him, was not made out. In a case like this, the plaintiff should, I submit, be permitted to fall back upon his general title when he fails to prove his lease: S. A. No. 235 of 1864 (per TUCKER and

GIBBS, JJ.), S. A. No. 140 of 1863 (per ARNOULD and FORBES, JJ.), and S. A. No. 356 of 1866.

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Bhairavnāth Mangesh for the respondent :—The plaintiff's claim was based solely on Exhibit No. 3. He must stand or fall by that alone. As he failed to prove the agreement, the Lower Courts very properly threw out his claim. He cannot shift the ground of his action—*Narainee Dosee v. Nurrohury Mohonto (a)* ; *Mohendronath Mookerjee, Overseer (b)* ; *Mudhoosooddun Gossamee v. A. Hills (c)*.



Upon the above contention, the Court made the following reference to the Full Bench on the 8th November 1871 :—

WEST, J. :—The Judge below has found that a lease set up by the plaintiff (No. 3) as that under which the defendant had become his tenant is not proved. He has further found that the leases Nos. 7 and 8, produced by the defendant, are proved. For the plaintiff, special appellant, it is now urged that, notwithstanding his failure to establish No. 3, his suit, being one for ejectment, rested on his title generally, and that he is entitled to fall back on the documents Nos. 7 and 8 if he pleases, and from them, taken with the other evidence, prove, if he can, that he is now entitled to eject the defendant. The defendant (respondent), on the other hand, contends that the suit having been expressly based on lease No. 3, and an alleged violation of its conditions, the plaintiff is not at liberty, now that he has failed in proving that document, to take up a ground of action differing from that originally selected by himself ; and that, having been defeated on that ground, he must bring another action if he wish to rely on any other.

In Special Appeal No. 235 of 1864, decided on the 8th August 1864, the plaintiff had sued to recover possession of a piece of land let by him to the defendant as his tenant. The claim was thrown out by the Principal Sadr Amin, whose decree was confirmed by the District Judge in regular appeal ; but in special appeal these decisions were

(a) Marsh. Calc. Rep. 70 ; see also pp. 47, 57, 236.

(b) 9 Calc. W. Rep. Civ. R. 206.

(c) 10 *Ibid*, 242.

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v.
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reversed on the ground stated by the learned Judges :—"The issue therefore simply is, whether the plaintiff, Bahirji, proved his right to recover possession of the land; and the determination of that issue depended on ascertaining the point whether the plaintiff's grandfather let the land to the defendant's father as tenant, as alleged." Here it would seem that the view of the law taken by the Court was that he, plaintiff, suing as landlord, ought to prove his demise and its expiration as under the English Law (*d*), though a direction is added that the Judge "should inquire and determine whether Bahirji (the plaintiff) has a proprietary right to the land, subject to the payment of certain dues to the temple."

In Special Appeal No. 140 of 1863, decided on the 13th October 1863, it seems probable, though the precise ground of the decision is not stated, that the judgment of the Court proceeded on the ground that the plaintiff having failed, in the opinion of the Assistant Judge, who tried the regular appeal, to prove the tenancy he alleged, except in part, his claim to eject the defendant must fail, except as to that part.

In Special Appeal No. 356 of 1866, on the other hand, in which the suit was to recover land alleged to have been "let to the defendant on condition that he should give it up on demand," the Court held that the District Judge, having decided that the tenancy of defendant under plaintiff was not proved, should have proceeded to determine—

(1) Whether plaintiff had established his original proprietary title to the land in dispute;

(2) If so, whether defendant had established adverse possession as proprietor for more than twelve years; and, that this might be done, reversed the decree of the District Court and remanded the cause for re-trial.

In Special Appeal No. 111 of 1867, decided on the 28th March 1867, a case very similar, as it would seem, in its

(*d*) Cole on Ejectment, pp. 393, 498; Roscoe on Evidence, p. 621, (11th edn.)

essential features to the one with which we have now to deal, the late learned Chief Justice and Warden, J., reversed the decree of the Assistant Judge, who had thrown out the claim, on finding that the agreement sued on was not proved, and directed that the second issue should be tried, viz., whether the ownership of the plaintiff was proved by other documents in the case.

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RA'VJI.

The action of ejectment under the English Law is one of a peculiar nature. Section 26 of the Code of Civil Procedure, requiring "the cause of action" as well as the "relief sought" to be set forth in the plaint, seems to intend that not only the right of the plaintiff, whether it arose from or was independent of contract, should be set forth, but also the particular violation of that right which, in his opinion, entitles him to a remedy at the hands of the Court. This is so in other cases, and no distinction seems to be contemplated between a suit for ejectment and any other suit. When, therefore, the plaintiff has stated as his ground of action a particular breach of a contract of tenancy which has given to him a right of re-entry, the defendant has denied the contract or the breach complained of, and the issues drawn upon this footing have been accepted as sufficient by the parties, it would seem that "the determination of the cause," to use the words of Lord Westbury, "should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made." This is, I think, the view generally acted on by the Lower Courts; but the plaintiff is sometimes allowed to shift his ground, as he seeks to do here, in a way hardly consistent with the general system of the Code of Civil Procedure. The matter is of practical importance, and as the views held by the Division Courts have not been uniform, I should wish to refer the question to a Full Bench,—whether A, suing as landlord or lessor to eject B as his tenant on the expiry of his term or for breach of his contract, is at liberty to rely, as the ground of his right, on a relation between him and B that has not arisen out of the alleged contract?

GIBBS, J.:—I have followed the precedents of the Court,

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some of which have been set out by my brother West; but I have always had a doubt in my own mind as to the propriety of allowing the general question of title to be gone into when the lease, the document sued on, was found not proved.

I believe the practice took its rise in suits by *Ināmdārs* on verbal leases. The Court considers that it would be unfair to let the *Ināmdār* suffer the loss of his *Inām* land, simply because he could not prove a verbal lease, and the feeling, I will not say principle, which induced the Court to rule in favour of the *Ināmdār* appears to have been extended to other cases. I quite agree in thinking the matter one deserving the consideration of a Full Court, and therefore agree in this reference.

Accordingly, the question proposed by the above reference was argued before a Full Bench, consisting of WESTROPP, C.J., GIBBS, LLOYD, MELVILL, and KEMBALL, JJ., on the 5th February 1872.

Shāntārām Nārāyan for the special appellant.

Bhairavnāth Mangesh for the special respondent.

PER CURIAM:—We are of opinion that in this case the question referred must be answered in the negative. The plaintiff has sued on a document which the Court below has believed to be a forgery. The general rule is that a party must be limited to the case which he puts forward in his plaint. He may indeed, from the commencement of the suit, put forward in his plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such order as may to it seem just, regarding the adjournment of the hearing and costs. But, as a general rule, a plaintiff must abide by his plaint. The adoption by the Courts of a general principle of decision other

than this would encourage perjury and forgery. Our view is supported by the observations of Sir B. Peacock in *Narinec Dasse v. Nurrohury Mohonto*, Marshall, Calc. R. 70, quoted in pp. 78, 79 of Broughton's Civil Procedure Code, 4th edition, and other cases there mentioned, and *Govind Rámchandra v. Shekh Ahmed* (c).

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 414 of 1871.

Feb. 15.

CHAKU MODAN ISA'NA' *Appellant.*

DULLABI DWA'RKA' *Respondent.*

Mesne Profits—Interest on Mesne Profits.

In a suit for mesne profits (not being a suit for land and its mesne profits) interest on mesne profits cannot be recovered.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge of Ahmadabad, amending the decree of the Subordinate Judge of Dhandúka.

The facts appear from the judgment of the Court.

The appeal was heard by WESTROPP, C.J., and LLOYD, J., on the 12th of February 1872.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Nagindás Tulsidás for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:—The defendant Chaku's grandfather, who was originally the owner of a field, mortgaged it in A.D. 1812 to Karsan Ranchhod and another. The plaintiff's father, Dwárká, purchased the mortgagees' interest and became transferee of the mortgage on the 22nd August 1853, but permitted the original mortgagees to remain in possession of the field. About the 4th of June 1859, the defendant, Chaku, who had succeeded to the mortgagor's interest in the field, although aware of the transfer of the mortgage to Dwárká, paid off the money due upon the mortgage to

(c) 5 Bom. H. C. Rep. A. C. J. 133.

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the representatives of the original mortgagees, and then obtained possession from them of the field. Dullabh having succeeded to the interest of his father, Dwarká, as transferee of the mortgage, filed a plaint against the defendant, Chaku, on the 18th July 1862, to recover possession of the field, and for mesne profits for three years previous to the filing of the plaint, but not for interest upon those mesne profits. He obtained a decree in that suit for possession and for the three years' mesne profits. He was put into possession of the field upon the 31st March 1866. Upon the 2nd March 1869, he filed his plaint in the present suit for further mesne profits, viz., for such profits from the 18th July 1862 (the date of the filing of the plaint in the former suit) to the 31st March 1866 (the date of delivery of possession of the field to the plaintiff) and for interest thereon at the rate of 9 per cent. per annum. The Subordinate Judge awarded to the respondent (plaintiff) Rs. 412-8 as mesne profits and interest thereon at 6 per cent. per annum. The Assistant Judge affirmed that decree as regarded the amount of mesne profits, but varied it as to the rate of interest, which he raised to 9 per cent. Both the appellant and the respondent in the present special appeal to this Court have objected to the mesne profits allowed—the appellant saying that it exceeds the actual produce of the field, and the respondent saying that it is below that produce. What that produce was we deem to be a question of fact, as to which we are bound by the finding of the Assistant Judge, who in that respect concurred with the Subordinate Judge. We therefore proceed to consider the only question of law in the case, viz., whether the respondent was entitled to any, and if any, to what interest upon the mesne profits.

Section 196 of Act VIII. of 1859 enacts that "when the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decreeholder, with interest thereupon at such rate as the Court may think proper."

The present suit is not a "suit for land or other property paying rent," but is one for mesne profits and interest only; therefore this case does not fall within the section quoted, although the mesne profits sought here are in respect of the period between the commencement of the suit and the delivery of possession.

Nor does Section 197 apply here, inasmuch as it provides only for the recovery of mesne profits in a suit for land and mesne profits which have accrued prior to the date of the suit. Moreover, that section is silent as to interest.

Section 11 of Act XXIII. of 1861, though conversant of mesne profits, yet is so with respect to the execution of decrees only, and is therefore inapplicable in this case (a).

Hence it appears that neither the Civil Procedure Code nor Act XXIII. of 1861 provides for an award of interest in an action for mesne profits as distinguished from an action to recover land or other property paying rent, in which interest may be given on mesne profits from the date of the suit to the date of the recovery of possession. The specification of that case would seem to be the tacit exclusion of interest on mesne profits in other cases.

If we look to the law in England and Ireland for light upon this subject, we do not find any ground for supposing that interest can in those countries be recovered upon mesne profits. A plaintiff is entitled to recover compensation for the use and occupation of the premises recovered during the time they were actually or constructively occupied by the defendant (b). It is true that in estimating damages in an action for mesne profits, the jury are not there restrained to the mere rent or produce of the premises, but may award by their verdict such sum, exceeding the value of the mesne profits, as the circumstances established in evidence shall

(a) See 2 Cal. W. R. Misc. App. p. 5; 3 Bom. H. C. Rep. A. C. J. 31, over-ruled 4 Bom. H. C. Rep. A. C. J. 181; 5 *Ibid.* A. C. J. 74; 6 Cal. W. R. Misc. R. 33, 100.

(b) *Doe v. Harlow*, 12 A. & E. 40 (head-rent paid by occupier should be deducted; 4 Tyr. 29. 2 Cr. & M. 145).—See 9 Cal. W. R. Civ. R. 457, 458, as to Wasilat; 5 *Ibid.* Mis. 35; 3 *Ibid.* Mis. 25, 30; 7 *Ibid.* Civ. R. 78, 230; 8 *Ibid.* Civ. R. 101, 103, 447; Cal. W. R. 1864 F. B. 40.

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warrant. In *Goodtitle v. Tombs* (c), Gould, J., said: "It must be taken for granted in this case that there was an actual ouster, and that the defendant kept him (the plaintiff) out from the time of the demise till the judgment in ejectment; the plaintiff in this case is not confined to the very mesne profits only, but he may recover for his trouble, &c. I have known four times the value of the mesne profits given by a jury in this sort of action of trespass (for mesne profits); if it were not to be so sometimes, complete justice could not be done to the party injured." And Wilmot, C.J., said: "Damages are not confined to the mere rent of the premises; but the jury may give more, if they please, as my brother Gould hath truly observed." Other authorities show what would come under damages for "trouble, &c.," of which Gould, J., speaks as properly awardable by a jury in actions of trespass for mesne profits: for instance, costs incurred in recovering possession, not only where the action of ejectment for that purpose was undefended (d), but where a verdict has been obtained against the defendant (e) or another person (f), and also the costs between attorney and client, incurred in a Court of Error in reversing a judgment in ejectment given erroneously in the defendant's favour, although the Court of Error could not have awarded costs to the plaintiff (g). And it would seem that the plaintiff may recover, in an action of trespass for mesne profits, compensation for waste or injury done to the premises, by carrying away fixtures which were not removeable by a tenant, or by committing other spoil or waste on the premises, *provided such matters are specially alleged in the declaration* (h). But nowhere do we find it stated that interest on mesne profits is recoverable.

Next as to the Indian authorities. In an unreported case decided on the 11th December 1871, Regular Appeal No. 18

(c) 3 Wils. R. 118, 121.

(d) *Doe v. Davis*, 1 Esp. 358; *Doe v. Huddart*, 2 Cr. M. & R. 316; *Pearse v. Coaker*, L. R. 4, Exch. 92.

(e) *Symonds v. Page*, L. Cr. & Jer. 29.

(f) *Love v. Reilly*, 2 Huds. & Br. 185 n; *Pry v. Donovan*, *Ibid.* 184.

(g) *Novell v. Roake*, 7 B. & Cr. 404; S. C. 1 Man. & Ry. 170.

(h) *Dunn v. Large*, 3 Douglas 335.

of that year, *Sitárám Bává v. Atmárám Bává*, by Melvill and Kempland, JJ., interest at 6 per cent. was given on mesne profits from the date of the institution of the suit *until payment*. But that was a suit for a share of land, and therefore, so far as the interest given was interest from the date of the suit until delivery of possession, fell within Section 196 of Act VIII. of 1859, and is accordingly so far inapplicable here. The only questionable part of the interest there awarded would be such part, if any, as might accrue between delivery of possession and payment. We may mention that the case of *Gundo Anandráv v. Krishnaráv Govind*, to which we shall presently refer, does not appear to have been cited in that case. In the unreported Special Appeal No. 287 of 1871, *Jasvánt Sing v. Russabhái Meghabhái*, heard on the 17th November 1871 by the same Judges, the Subordinate Judge gave interest on mesne profits, but no question as to interest was raised or argued in the High Court. In *Rajah Leelanund Singh v. The Government of Bengal* (i), the liability to pay interest on mesne profits was allowed by Government to pass *sub silentio*, the only question there made and decided being one of jurisdiction. That case, therefore, is not an authority as to interest being properly chargeable on mesne profits.

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The suit for mesne profits is not a suit for a debt but for unliquidated damages, and, as a general rule, interest is not allowable on a claim for unliquidated damages (j). A statute (3 and 4 Wm. IV., c. 42, s. 29) was deemed necessary in England to enable the jury in actions of trover or trespass *de bonis asportatis* (in which actions damages are unliquidated) to give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof. That enactment has been introduced into India for the Queen's Courts by Acts IX. of 1840 and XXVI. of 1841.

In *Gundo Anandráv v. Krishnaráv Govind* (k), which was a suit to recover a share in the profits of a wátán payable

(i) 1 Calc. W. Rep. P. C. 21. (j) 7 Bom. H. C. Rep. A. C. J. 89, 98.

(k) 4 Bom. H. C. Rep. A. C. J. 55.

1872. out of three villages, seven years' arrears, due previously to the filing of the plaint, were awarded with interest by the Lower Courts. The High Court varied that decree so far as it granted interest, which it refused to allow, Couch, C.J., saying that "there is no law which enabled the Lower Courts to award interest" in such a case.

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Damages for mesne profits are not a debt or sum payable at a certain time, nor has any demand, in writing, of payment of mesne profits been proved to have been made: this case, therefore, does not come within Act XXXII. of 1839 (l).

We have arrived without doubt at the conclusion that interest was improperly awarded in the Courts below—by the Subordinate Judge at 6 per cent., and by the Assistant Judge at 9 per cent. We hold that interest at any rate whatever cannot be allowed in such an action as the present, brought, as it is, to recover mesne profits and interest only.

[APPELLATE CIVIL JURISDICTION.]

Feb. 19.

Miscellaneous Special Appeal No. 30 of 1871.

YENKOB A' BA'LSHET KA'SA'R..... *Appellant.*
RAMBHA'JI valad ARJUN *Respondent.*

Jurisdiction—Decree for sale of mortgaged property out of jurisdiction
—*Civ. Proc. Code, Sec. 5.*

A suit for the recovery of a mortgage debt by the sale of the mortgaged property is not a suit for land within the meaning of Sec. 5 of the Code of Civil Procedure.

A Court may decree the sale of mortgaged immoveable property though situate beyond its jurisdiction.

THIS was a miscellaneous special appeal from an order of A. C. Watt, Acting Judge of Khandesh, confirming an order of the Subordinate Judge of Amalnair, refusing to execute a decree.

(l) See *Harper v. Williams*, 4 Q. B. 219; 12 L. J. Q. B. 227.

The plaintiff brought a suit in the Court of the Subordinate Judge at Erandol upon a mortgage bond for Rs. 1,000, which amount, with interest and costs, he sought to recover from the defendant personally, and, in default of payment by the defendant, by a sale of the mortgaged property. The property mortgaged was situated within the jurisdiction of the Subordinate Judge of Amalnair. The Erandol Subordinate Judge decreed that the plaintiff should recover from the defendant Rs. 1,738-13-7, and that if the defendant did not pay that amount, the plaintiff should realize the same by the sale of the mortgaged property. On an application for execution of this decree coming on before the Amalnair Subordinate Judge, he was of opinion that the Erandol Subordinate Judge had no jurisdiction to order a sale of immoveable property not situated within the limits of his jurisdiction. In appeal, Mr. Watt was of the same opinion. He, therefore, confirmed the order refusing execution.

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The special appeal was heard by GIBBS and MELVILL, JJ.

V. N. Mandlik, for the special appellant:—This is not a suit for immoveable property. All the cases bearing upon this subject are cited in the 4th edition of Broughton's Commentaries on the Code of Civil Procedure, under Section 5, and support my contention.

Pándurang Balibhadra, for the special respondent.

PER CURIAM:—We think that this is not a suit for land within the meaning of Section 5 of Act VIII. of 1859. Comparing that section with Sections 223 and 224 of the Code, we think that a suit for land is a suit which asks for delivery of the land to the plaintiff. We may observe that the Court of Chancery, though it has no power directly to affect property situate out of the bounds of its jurisdiction, and will not therefore try the validity of a will of land in the Colonies though made in England: *Pike v. Hoare* (a), nor entertain a bill of partition: *Archer v. Preston* (b), yet will order the sale of an estate in the Colonies, in order to realize a sum of money charged upon it: *Gascoigne v.*

(a) 2 Eden 182

(b) 1 L. Eq. Abr. 133.

1872. *Douglas (c) and Noel v. Robinson (d).* We reverse the orders of the Courts below, and direct that the Subordinate Judge of Amalnair dispose of the application for execution according to law with reference to this judgment.

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Order accordingly.

[INSOLVENT DEBTORS' COURT.]

Feb. 21.

In re N. D. COORLAWALLA.

Indian Insolvent Act, Secs. 47, 50, and 60—Personal discharge under Sec. 47—Subsequent inquiry under Sec. 60—Evidence—Imprisonment of Insolvent under Sec. 50.

An insolvent, whose personal discharge has been opposed under Sec. 47 of the Indian Insolvent Act, can be again opposed by the same creditor, and on the same grounds, when he applies for an absolute discharge under Sec. 60.

The order made on the hearing of the petition under Sec. 47 of the Act can be used as evidence against the insolvent when applying for his discharge under Sec. 60, provided that such order clearly states the offences established against the insolvent.

An insolvent by being punished under Sec. 50 of the Act does not thereby cease to be liable in respect of such offences when he applies for his discharge under the 60th Section.

The discharge under Sec. 60 of an insolvent who has already obtained his discharge under Sec. 47 is not as of course, but will depend upon the general conduct of the insolvent both before and subsequent to his obtaining his discharge under Sec. 47.

THE facts of this case appear fully in the judgment of the Court.

The petition of the Insolvent came on for hearing before Gibbs, J., on the 20th of December 1871 and the 10th of January 1872.

Marriott, for the opposing creditors.

The Insolvent in person.

Cur. adv. vult.

(c) *Dick*. 431.

(d) 1 *Ver.* 90, 453, 460.

21st February 1872, GIBBS, J. :—The Insolvent in this case obtained an order for his discharge under Section 47 of the Insolvent Debtors' Act on the 23rd July 1869 from the present Chief Justice, then sitting as Commissioner in this Court, such order directing that he (the Insolvent) should, under Section 50, previously undergo two years' imprisonment. The order runs as follows : " Forasmuch as it appears to this Honourable Court that the said Insolvent, Navroji Dhanjibhái Coorlawalla, has (1) fraudulently, with intent of diminishing the sum to be divided among the creditors, made away with and concealed a sum of rupees fifty thousand ; and (2) fraudulently, with intent to conceal the state of his affairs and to defeat the objects of the said Act, purposely withheld the production of a certain Guzerathi account book and certain receipts, respectively, relating to his affairs, subject to investigation under the said Act ; and (3) wilfully altered and falsified a certain other book of account, namely, an English account book, containing a register of boatloads of sand and *murum*, whereby he has brought himself within the meaning of the fiftieth section of the Act, this Court doth adjudge that the said Insolvent, Navroji Dhanjibhái Coorlawalla, be forthwith taken into the custody of the gaoler of the Common Gaol of Bombay by virtue of a warrant under the seal of this Honourable Court, and that the said Insolvent shall be discharged from custody and entitled to the benefit of the said Act * * * so soon as the said Insolvent, Navroji Dhanjibhái Coorlawalla, shall have been in custody on the criminal side of the said gaol for the period of twenty-four calendar months, to be computed from the date of this order." It appears that after being in prison for about ten months he was released by order of the Governor in Council on the ground of ill-health. He now applies for a discharge in the nature of a certificate under Section 60 of the Act. This application is opposed, and Counsel having been heard for the opposing creditor, and also the Insolvent, I adjourned the case for consideration. The questions raised were, whether (1) an insolvent, who had been opposed at the time he applied for his personal discharge under Section 47, could be opposed by the same creditor on the same grounds on his

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application for a discharge in the nature of a certificate under Section 60; (2) if he could, then whether the Court could enter the decision of the Commissioner, sitting to adjudge the discharge under Section 47, as evidence against the Insolvent under Section 60, or whether fresh proceedings should not be taken; and (3) whether, having been punished for the offences of which he was found guilty in the inquiry under Section 47, he could still be held liable for the same offences when the question was for a discharge under Section 60.

As regards the nature of the two orders under Sections 47 and 60, respectively, I see no ground for altering the opinion I expressed in the case of *Pestaji and Edalji Káká (a)*, to the effect that the benefits derivable from the latter order were so great as to justify the Court, when deciding on the application, in considering the entire facts connected with the Insolvent's trading both before and since his insolvency, and I therefore on this ground, as well as on a review of the procedure under the old Bankruptcy law in England, consider that the creditors have a right to oppose the granting of this greater boon equally as to the former and smaller benefit under Section 47 and on the same grounds.

On the second question raised, I had doubts when the case was argued, which required me to take time to consider. The case *in re Phillips (b)*, as shortly noticed in Shelford's Practice, led me at first to consider that a fresh inquiry might be necessary; but upon reading the full report of the case, and further considering the law as then in force at home, and the terms of the Insolvent Act for India, I have come to the determination that I may rightly use the order of the Chief Justice as proof of what was found proved against the Insolvent. If the formal order had been too vague to show this, I think I must then have taken the evidence *de novo*; but on this latter point I do not bind myself to any decision, as there is no need for my so doing—the order on record by

(a) 8 Bom. H. C. Rep. O. C. J. 37.

(b) 20 Law Times, 15.

the Chief Justice being quite full and distinct as to the charges established against the Insolvent.

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On the third point, I must also record my decision against the Insolvent. The wording of the Act, to my mind, clearly gives me equal power in dealing with an application under Section 60 as under Section 47; the words of the former section are, that the Court has power to make the rule absolute, *i.e.*, to grant the order, or "to dismiss such petition, or to adjourn the further hearing thereof, or to make such order thereon as shall be just; and further, the Court can, in granting it, limit its operation as to its effect on after-acquired property." Now, surely it could never have been the intention of the Legislature to mean that if an insolvent had been punished for fraudulent practices, he might, after undergoing the punishment awarded, come and, as a right, demand his discharge under Section 60. It is quite true that the object of the Insolvent Act here, as the Bankruptcy Act at home, is to enable traders to start fair again; but, as I stated more fully in the case of the *Káká Brothers*, above alluded to, it could not be intended to allow persons guilty of practices and acts opposed to honest dealings to have as fair a start again as an honest, though unfortunate, trader. The classification of certificates under the provisions of the former Bankruptcy Law at home has not been introduced into the Indian Act, but the 60th section gives the Court ample means to deal with such cases as the present; and I have now, therefore, to consider what my duty is with regard to the Insolvent. Should he be allowed a discharge at all; or, if allowed one, on what terms? I find from the recorded decision of Sir M. Westropp, that the Insolvent was considered by him to have been guilty of the following offences:—(1) Making away with and concealing Rs. 50,000; (2) withholding receipt books and papers; (3) altering and falsifying an account book. From inquiry, I learn that since this order the Insolvent has not been near the Official Assignee: he did not appeal against the Commissioner's decision, but he has not attempted to put matters in a train for the benefit of his creditors: the schedule filed with the

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present petition is simply a copy of that originally filed, and which was held to be faulty and fraudulent. I mention this particularly, as insolvents here seem to think they will get their discharge under Section 60 as a matter of course; and that, after they have received their personal discharge under Section 47, they have nothing more to do than apply for the further benefits of the Act, that they may leave the Official Assignee to do what he likes and what he can without further assistance from them—a course very opposite to what the Act requires, both in its spirit and its letter. I consider that, in deciding this application, I must follow the English cases. By the 5 & 6 Vic., c. 122, s. 38, which was the law in England similar to our present Act here, it was enacted that any bankrupt who shall be guilty of concealing, altering, or falsifying any of his books or papers, with the intent to defraud his creditors, or with the intent to defeat the objects of the Bankruptcy law, or who shall have concealed any of his property, was not to be entitled to a certificate. The Insolvent has been found guilty of concealing, altering, and falsifying his accounts, and also of concealing some of his property: it is clear, therefore, that he could not have got a certificate under the Bankruptcy Act at home. In the case of *ex parte Knight (c)*, Lord Justice Turner, in upholding an order refusing a certificate, says: "There is nothing against which the Bankrupt Law points more strongly than falsification of books. I think it would be a highly dangerous thing to relax the law in such case as this." In *ex parte Dobson in re Strong (d)*, the same learned Judge observes: "This Court has never failed to visit fraud and falsehood with severe penalties"; and Lord Justice Knight Bruce in the same case says: "In the present case the bankrupt has been proved to have been guilty of wilful falsehood as to the state of his affairs, to have been guilty of intentional concealment of his goods for the purpose of defeating his creditors, and to have committed other offences which the gravity of those to which I have referred makes it needless to mention. If we were to grant this man a certificate, we

(c) 26 L. J. Bank. 57

(d) 25 L. J. Bank. 17.

should contradict our whole practice and everything we have hitherto said or done in cases of this description." A certificate is not a matter of right, but of discretion. It is true such must be exercised on judicial principles; but those principles mark the duty of attending to the public interests and the claims of society, and I cannot hide from myself the wholesale fraud of which the insolvent appears to have been guilty. He was justly punished by this Court, but soon escaped its effects on the plea of ill-health. Had he suffered the entire period of imprisonment that my predecessor awarded him, I should have hesitated to give him an order under Section 60; but I have now no hesitation in refusing it to him, as I think that his conduct before and since his insolvency is such as to bar his having a claim to start free once more as a merchant of this city. The application is rejected, and the Insolvent must pay the costs of the opposing creditors.

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[ORIGINAL CIVIL JURISDICTION.]

L. A. 5 Com. 143.

Suit No. 718 of 1870.

Feb. 21.

THE ADVOCATE GENERALPlaintiff.

FATIMA' SULTA'NI BEGAM and another ...Defendants.

Muhammadian law—Wakf—Founder's right to appoint manager—Manager chosen from specified class—Akriba, meaning of term—Wife of founder.

Although, according to Muhammadian law, the founder of a *Wakf* has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (*e. g.*, from amongst his relations), he cannot afterwards name a person as manager not answering the proper description.

After the death of the founder the right to nominate a manager of the *Wakf* vests in the founder's vakils or executors, or the survivor of them for the time being.

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The term *Akriba* (relations), though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity.

The wife or widow of the founder is not included amongst his *Akriba*.

BY a *Wakifnámá* bearing date the 17th of October 1861, Agá Háji Muhammad Hussen Shirazi declared that he had made over, for the use and benefit of a *Musjid* theretofore erected by him, near the Imám Wádá of the Mogals, at Babula Tank, certain buildings situate at Mazagon, consisting of two bungalows and a garden attached thereto, containing fruit and other trees. The terms of the *Wakifnámá*, so far as they are important for the purposes of this report, are set out in the judgment of the Court.

Agá Háji himself acted as warden and manager of the *Musjid*, and applied the rents of the Mazagon premises to the use and benefit of the *Musjid* until his death, which took place on the 29th of June 1869. He died without issue, and left a will, whereby he appointed his wife, the defendant, Fatimá Sultán Begam, and two Parsi gentlemen, respectively, his executrix and executors.

After the death of Agá Háji, his wife, Fatimá, entered into possession of the premises. Before the suit was filed one of the executors had died, and the other had refused to act under the will as executor. The plaintiff, which was filed by the Advocate General at the relation of Agá Nusrulá Alli bin Hyderalli Shirazi, the son-in-law of Agá Háji, and four other Muhammadans of the Shia faith, submitted that the above premises had been validly appropriated to the use and benefit of the *Musjid* according to Muhammadan law; charged that the defendant, Fatimá, had appropriated the rents of the charity-property to her own use, and prayed that it might be declared that the said buildings and ground situate at Mazagon had been validly appropriated according to Muhammadan law to the use and benefit of the *Musjid*; that an account might be taken of all moneys received by the defendant, Fatimá, in respect of the rent of the said buildings due since the death of Agá Háji; and that she might pay into Court the money found due from her in such manner as the

Court should direct, in order that the same might be applied for the use and benefit of the *Musjid*; that she might be restrained from receiving any moneys in respect of the rents of the buildings and ground; that a fit and proper person might be appointed warden; and that the buildings and ground might be conveyed and assigned, as the Court should direct, for the use and benefit of the *Musjid*.

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The defendant, Fatimá, alleged that she, by reason of her relationship to the founder, was the trustee and manager of the premises, and, as such, entitled to receive and apply the rents thereof to the use and benefit of the *Musjid*. She also stated that the founder had in his lifetime verbally appointed her such trustee and manager, and in furtherance of such appointment had made her executrix of his will. She denied that she had misappropriated any portion of the rents or proceeds of the premises in question, or applied them to her own use.

The second defendant, Agá Futtah Alli, the eldest son of Mussidi Kásim, the eldest brother of Agá Háji, claimed, as such, to be appointed the warden and manager of the *Musjid*. At his own request he had been made a party, defendant, to the suit.

The cause came on for hearing before SARGENT, J., on the 11th of December 1871.

The *Honourable J. S. White* and *Scoble* for the plaintiffs and relators.

Anstey, Marriott, and Latham, for the defendant, Fatimá.

Atkinson, Serjeant, and Webb, for the defendant, Agá Fatt Ali.

The issues raised were—(1) Whether the defendant, Fatimá, was a fit and proper person to be appointed warden of the trust premises; (2) whether she had been verbally appointed such guardian subsequently to the *Wakifnáma*; (3) whether, if so, such appointment would be valid; (4) whether the second defendant was a fit and proper person, within the meaning of the *Wakifnáma*, to be appointed guardian.

Cur. adv. vult.

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SARGENT, J. :—This suit arises out of a *Wakifnámá*, written partly in Arabic and partly in Persian, executed by one Agá Háji Muhammad Shirazi on the 17th October 1861, by which, after reciting that he had built a mosque in this populous city of Bombay, he declares that he thereby makes a legal, firm, and clear endowment of the whole and every part of his garden, situated in the district of Mazagon, together with two bungalows therein comprised, in favour of the mosque, and that such endowment is made in such way that whatever income derived from the garden and two bungalows there may be remaining, after deducting their expenses, shall be expended in making the necessary repairs and in defraying the expenses of the mosque; viz., matting, oil for lamps, and the stipends of the Imám and the crier, and of a servant and other necessary expenses. And if after defraying the expenses of the mosque there should be any surplus, then that the surplus should be expended in defraying the expenses of the mourning days of the founder, the chief of the martyrs. And he adds that the guardianship of it (apparently meaning the mosque) rests with the endower during the term of his natural life, and after his decease it rests with any one of his, the endower's, relations who may be intelligent and of good reputation, provided he shall be resident in Bombay; otherwise the guardianship rests with any Shiraz merchant of good reputation.

Agá Háji Muhammad died on the 29th June 1869, having acted as guardian of the mosque and its endowment down to the time of his death, since which time it is admitted that the defendant, Fatimá Sultáni Begam, the widow of the endower, has, as a matter of fact, had the management and administration of the premises so appropriated. The relators by their present suit charge that the defendant, Fatimá, has appropriated the rents of the charity-property to her own use, and seek to have an account taken of all moneys received by her in respect of the same. That she may be restrained from further receiving the rents on account of such misappropriation, and that a fit and proper person may be appointed warden of the *Musjid*, or otherwise

to receive the rents of the said property, and that the same may be conveyed and assigned, as the Court may direct, for the benefit of the *Musjid*. The defendant, Fatimá Sultáni Begam, by her written statement, denies the appropriation of the rents to her own use, and claims to be continued in the management or administration of the charity-property as the trustee thereof, according to the construction of the *Wakifnámá* and the intentions of the donor declared and expressed in his lifetime, and in execution of the trusts of his will, by which she was named executrix, and whereof she has obtained probate; but that in any case, as one of the relations within the meaning of the provisions of the *Wakifnámá*, she is entitled, by Moslem law and the usage of Shias, to be preferred *ceteris paribus* to every other relative of the donor.

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Subsequently, one Agá Fatte Ali bin Mussidi, nephew of the donor, and married to the donor's only daughter, was made a defendant, and filed a written statement by which he claims to be appointed manager and warden of the *Musjid*. The following issues were raised at the hearing—(his Lordship stated them, and continued):—Now, the clause in the *Wakifnámá* relating to the guardianship does not specify the subject-matter of that guardianship. The words are “taulyat an,” i. e., “superintendence of it.” The official translation suggests the word “mosque” as intended by the pronoun “an” or “it.” Grammatically speaking that is probably correct; but in any case the context and the object of the instrument itself can leave no doubt, I think, that the donor is providing for the appointment, after his death, of the officer commonly known as Mutawali. The term “taulyat” would appear to be a technical one as applied to mosques and their endowments, meaning, as stated in Richardson's Arabic Dictionary, their management and superintendence. In the answer to Case 8, at p. 340 of Macnaghten's Muhammadan Law, it is stated to denote the office of the Mutawali, whose duty it is to take charge of the property appropriated, and to attend to the distribution of the proceeds of the endowment. That the superin-

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tendence or management extends to the property, and is not merely confined to the surplus income referred to in the *Wakifnámá*, is shown, not only by the use of the technical term "taulyat," but derives corroboration from the language used by the donor in the deed of dedication of the mosque when speaking of the property which he contemplates being purchased as a *Wakf* for the *Musjid* out of any possible surplus there might be after providing for the building of the mosque; he provides in express terms for the management or superintendence of the property itself given as an endowment (using the same word "taulyat" as in the *Wakifnámá*.) This, he says, is to vest in himself during his life and after his death in the same persons with some slight change of description as are mentioned in the *Wakifnámá*; and he adds, he (the superintendent) is to spend the profits of the property in defraying the above-mentioned expenditure, including the keeping up of the property.

Now it is clear upon the authorities, both Suni and Shia, that the appropriator has a right to reserve the superintendence of the *Wakf* to himself, or appoint some one else. (See Baillie's *Imameea*, p. 214, and his *Digest of Muhammadan Law*, pp. 591—593.) I am, however, unable to find any authority for holding that when the donor has specified the class from whom the manager is to be selected, he can disregard his own trust-deed, and name a person not answering the proper description. He is bound, I apprehend, by the provisions of the *Wakifnámá*; and the appropriator's right of nomination of the person to succeed to the management on his death must, I think, be confined to the class mentioned in the *Wakifnámá*. Now, the donor subsequently made a will, by which, after appointing his wife and two Pársi gentlemen to be his vakils, he directs them to carry out the provisions of the clauses of his will, by the 4th of which, after alluding to the endowment of the garden and bungalows at Mazagon, the testator says:—"Therefore, out of whatever income of the same there may be yielded, outlays being first made for the expenses of all kinds that may be

incurred for the said garden and the expenses for such repairs and work as may be found (necessary) for the bungalow and the other buildings, the surplus which there may be shall duly be expended in accordance with all the conditions written in the writings made in the Mogal (or Persian) character and language relative to the expenditure of the said *Musjid*."

Now, although there are no words expressly appointing the Vakils to be managers of the property, this language might well be construed as impliedly vesting the management in them, were it not for the circumstance that two of the Vakils do not fall within the class mentioned in the *Wakifnāma*, and the well-established rule of Muhammadan Law, that neither vakils nor superintendents of endowment can act separately (Macnaghten, p. 71). The intention, however, of the testator may well have effect given to it by construing the words as directing them to do what was necessary to give effect to the endowment in accordance with the provisions of the *Wakifnāma*, viz., by appointing a manager or superintendent, and putting him in possession of the property, a power indeed which would appear to be vested by Muhammadan Law in the vakils *ex officio*. At p. 593 of Baillie's Muhammadan Law, it is said that when the superintendent dies, and the appropriator is still alive, the appointment belongs to him, and if the appropriator is dead, his executor is preferred to the Judge; and this rule was acted upon in the case reported at p. 17 of S. D. A. Bom., and referred to at p. 507 of the Appendix to Macnaghten.

The power of appointment having been thus vested in the executors on the donor's death, and there being no evidence before the Court of any such appointment having been made, (although, as a matter of fact, the defendant, Fatimā, has since her husband's death had the management of the property,) it remains to consider in whom, under the circumstances which have since occurred, the power of appointment is still vested. It appears that one of the vakils is dead, and the other has renounced probate, and by his affidavit states that he has never acted or taken any part in the administration of the estate, and the widow is, therefore, now the only

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executrix of the testator surviving and competent to act. At page 249 of Baillie's Digest of the Shia Law, it is said that if one of the executors should fall sick or become incapable of performing the duties of the office, the Judge must appoint a person in his place to act for him; but if one of the executors should die or become profligate, the Judge has no such power, and the remaining executor is empowered to act singly; the Judge having no authority while there is an executor of the deceased surviving and competent to act; but that the point is open to some doubt and difficulty. The nature of the difficulty is not mentioned. The learned editor, however, refers in a note to the doctrine of the Haní-fites as being opposed to it. According to the Hidayah, Abu Haníffá and Muhammad hold that the surviving executor should lay the matter before the Judge, who, if he think proper, may make him sole executor. According to Abu Yusaf, he may act alone. Upon this state of the authorities there appears to be no sufficient reason for adopting a different rule, at least where the parties, as here, are Shias, from what prevails in English law, viz., that the office of executor survives and carries with it all the ordinary functions of the office, amongst which, according to Muhammadan Law, is the power of appointing a superintendent of a *Wakf* in the absence of any express provision. The question, however, has little practical importance, as this Court having now jurisdiction over the charity, such appointment must necessarily, according to the well-established practice, be made with the sanction of the Court.

There remains to consider who are the persons eligible for the post of Mutawali; in other words, who are the persons included in the term *Akriba*. [His Lordship then proceeded to discuss the meaning of the term *Akriba*, and decided that that term, like the term relations in English Law, though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity, but the wife or widow of the founder is not included amongst the number.]

A declaration was accordingly made that the defendant, Fatimá Sultáni Begam, was entitled to select a Mutawali of the mosque from the persons related to her late husband by blood or affinity, such selection to be sanctioned by the Court, and (in case the relators desired it) a decree for a reference to the Commissioner to take the accounts of the rents of the garden and bungalows, the defendant, Fatimá, to be charged an occupation rent during such time as she had been in occupation of the bungalows and garden, or either of them. The costs of the suit were also provided for.

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Attorneys for the plaintiff, *Keir, Prescott, and Winter.*

Attorneys for the defendant, *Fatimá, Craigie, Lynch, and Owen.*

Attorneys for the defendant, *Agá Fatto Ali, Thacker and Chalk.*

[ORIGINAL CIVIL JURISDICTION.]

Appeal Suit No. 189.

March 16

T. F. PUNNETT, Official Liquidator
of the Mercantile Credit and Financial
Association (Limited) *Appellant.*
VINA'YAK PA'NDURANG *Respondent.*

*Act XXVIII. of 1865, Sec. 24—Final Discharge of Trader—Liability
to future calls.*

An Insolvent Trader, who has obtained his discharge under Sec. 24 of Act XXVIII. of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a Joint Stock Company, when the order for the winding up of such Company has been made prior to the time of the Insolvent Trader obtaining his discharge.

THIS was an appeal from an order of Sargent, J., made in Chamber on the 23rd of November 1871, whereby he made absolute a summons directing the name of Vináyak Pándurang to be struck out of the list of contributories of the Mercantile Credit and Financial Association (Limited).

1872. Vináyak Pándurang was a holder of 275 shares in the above
 T.F.PUNNETT Association. The Association was in 1867 ordered to be
 wound up, and the name of Vináyak Pándurang was, on the
 VINA'YAK 8th of August 1867, placed upon the list of contributories in
 PA'NDURANG. respect of 275 shares. It so remained upon the list down
 to the hearing of the summons.

The estate of Vináyak Pándurang was on the 14th of November 1866 ordered to be wound up under Act XXVIII. of 1865, and he obtained his discharge under that Act on the 26th of February 1870. Whilst the estate of Vináyak Pándurang was in the hands of his trustees, the Liquidator of the appellant's Company sent in a claim against the estate in respect of a second call of Rs. 150 per share on the 275 shares held by Vináyak Pándurang, as also in respect of other debts due by him to the Company, and received a dividend on their claim. In the final account filed by the trustees the gross claim of the appellant's Company was entered. The particulars of that claim were not set out in that account, but such particulars had been set out in previous accounts filed by the trustees. No mention was made of any call or anticipated call on the trader's 275 shares, nor was any provision made for paying a dividend on any such call.

A third call of Rs. 40 per share was made upon the contributories of the appellant's Company on the 9th of November 1871, payable on the 9th of December 1871, and a notice to pay the call was served upon Vináyak Pándurang, whereupon he took out the Judge's summons above referred to.

The appeal was heard by Westropp, C.J., and Lloyd, J., on the 16th of March 1872.

Ferguson (with him *Latham*), for the appellant:—As the trustees of the trader have filed their final account, they are free from all liability in respect of the call: Act XXVIII. of 1865, Section 22. No provision has been made for it in the winding up of the trader's estate, though such provision might have been made: *Dádábhái Byramji's case* (a). The trader, I submit, notwithstanding his final discharge, continues liable.

(a) *Coram Westropp, C. J., and Sargent, J., 1869.*

The call is a transaction. No mention is made of it in the final accounts, and Section 24 of the Act has, therefore, no application. He cited VI. Geo. IV., chap. 16, s. 51; Walker and Webster's Dictionary, Tit. "Transaction"; 11 and 12 Vict., c. 21, ss. 47 and 60; *Parbury's case* (b). 1872.
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Macpherson, for the respondent, contended that the transaction in respect of which the present liability arose was the contract that the trader entered into with the Company when he became owner of shares in it, and that, though such contract was not specifically mentioned in the final account, there was sufficient therein stated to give notice to any one inspecting that account of the fact of the trader having entered into that contract, and, that being so, Section 24 of the Act completely protected the trader. He referred to the case of *Babá Sáheb Damaskar* (c).

Ferguson, in reply—

WESTROPP, C. J.:—The question before us arises in an attempt on the part of the Liquidator of the Mercantile Credit and Financial Association (Limited) to render one Vináyak Pándurang liable, as a contributory in that Association, in respect of a call (being the third call) made on certain shares which Vináyak Pándurang held when his estate was ordered to be wound up under the provisions of Act XXVIII. of 1865, and which call has been made since Vináyak Pándurang obtained his discharge under that Act.

It seems to us that, under Act XXVIII. of 1865, the contingent liability of Vináyak Pándurang to calls in respect of these shares was a matter which might have been estimated and proved, and that the Liquidator would have been entitled to dividends in respect of that estimated liability. The English Companies' Act of 1862 was the first legislative enactment which allowed of proof being made in Bankruptcy in such cases. After referring to the decisions prior to that Act, Mr. Lindley, at p. 1161 of his work on Partnership, says: "The difficulties arising from the conflict of these decisions are, however, apparently removed by the Companies'

(b) 3 De G. F. & J. 80.

(c) 8 Bom. H. C. Rep. O. C. J. 117.

1872. Act of 1862, for by Section 75 of that Act it is expressly
 T.F. PUNNETT declared that the liability of any person to calls where a Com-
 v. pany is being wound up is to be deemed a debt accruing due
 VINA'YAK from him at the time his liability commenced, but payable
 PA'NDURANG. when the calls are made, and the estimated value of his
 liability to future calls as well as calls already made are, in
 the event of his bankruptcy, provable against his estate; and
 it has been settled by judicial decisions that a person's liabi-
 lity commences within the meaning of the above section
 when he becomes a member." For that proposition he cites
 the cases of *ex-parte Canwell* (d) and *Williams v. Harding* (e),
 and proceeds: "If this be so, all calls made under the wind-
 ing up of a Company are provable against the estate of a
 bankrupt shareholder, although the calls and the winding-up
 order are subsequent to the adjudication. But if a bankrupt
 shareholder continues to hold his shares after he has ob-
 tained his order of discharge, he must, it is apprehended,
 be liable to calls made under a subsequent winding-up order."
 The latter proposition has no bearing in the present case,
 for here the winding up of the Company and the proceedings
 under Act XXVIII. of 1865 were contemporaneous; there
 were no longer any shares for the trader, on his obtaining
 his final discharge, to retain, as the Company became a
 defunct Company before that event occurred, and the calls
 were subsequently made in respect of shares in that defunct
 Company. If the Insolvent Trader had had shares in a living
 Company, and had continued to hold them after obtaining his
 final discharge, then Section 24 of Act XXVIII. of 1865
 would not perhaps protect him; but here the Insolvent
 Trader and the Company, if I may so express myself, both
 died together. The present claim would, therefore, have
 been provable in Bankruptcy in England.

Now Section 40 of the Indian Insolvent Debtors' Act
 provides that all such debts as might be proved under a fiat
 of bankruptcy according to the provisions of the 6th Geo.
 IV., c. 16, or any other statute or statutes then in force,
 or *thereafter to be passed*, relating to bankrupts, may be

(d) 10 Jur. N. S. 481. (e) L. Rep. 1 Ho. Lo. Ca. 9.

proved under the Indian Insolvent Debtors' Act. The provision in Section 75 of the English Companies' Act is, in our opinion, an enactment relating to bankruptcy, and a debt falling within the purview of that section is a debt that, as being provable under a fiat in bankruptcy, is also proveable under a petition in insolvency.

Now Act XXVIII. of 1865 makes no special provision for the proof of debts, nor does it lay down what debts shall be proveable in the winding up of an estate under its provisions; but in Section 15 it is enacted that the Court shall have jurisdiction, at any time during the liquidation of any trader's estate, to entertain any application of the trader, or of any person claiming to be a creditor, &c.; and Section 25 provides that the Judge or the Court to whom an application is made or referred shall have power to make any order which could be made by a Commissioner of the Court for the Relief of Insolvent Debtors under Statute 11 and 12 Vict., c. 21; and we think that, looking to these sections, any debt which might be proved under the Indian Insolvent Debtors' Act might also have been proved under Act XXVIII. of 1865. This is the conclusion we formerly arrived at in the case of the *Commercial Bank v. Byramji Dádábhái*. We there held that a claim in respect of calls on shares held by Byramji Dádábhái, which calls were made after his estate began to be wound up, was provable against his estate, and also the estimated extent of his liability in respect of future calls. We, therefore, think that the Liquidator might have proved in respect of this contingent liability. If he could not have done so, we do not think that it would have been now possible to exclude Vináyak Pándurang from liability.

The only matter that remains to be considered is the effect of Section 24 of Act XXVIII. of 1865. Is a call which is made after the Insolvent Trader's discharge a liability from which he is protected? That section enacts that the order of discharge shall operate to discharge the trader and all property and effects acquired by him subsequent to the filing of the order therein first mentioned from all debts, claims, or demands in respect of the transactions included in the

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1872. account filed by the trustees. It is clear that the trader personally, and his effects acquired subsequent to the vesting order, are protected from debts mentioned in the final account; but the difficulty arises on the meaning of the word "transactions." It is admitted that the contingent liability in respect of these shares is not in so many words mentioned in the final accounts; but it has been seen that the liability of a shareholder within the meaning of Section 75 of the English Companies' Act is a liability incurred by him upon becoming a member of the Company. His liability is a liability in respect of the contract he thereby enters into, and does not merely arise when a call is made to enforce that contract.

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That being so, the "transaction" in respect of which the liability arises is the contract the trader entered into with the Company when he became owner of these shares. Now, no doubt, in the final account before us, that contract is not specifically mentioned, but it is substantially included in it; for, on reference to the account, we find a sum of Rs. 40,000 mentioned as the sum due to the Official Liquidator of the Mercantile Credit and Financial Association upon which he has received dividends, and it is not denied that that amount includes the liabilities of the trader in respect of the second call made upon these very shares. Now the mention of the payment of calls in respect of these shares is substantially a mention of the original liability of the Insolvent Trader in respect of these shares. We think that we should be defeating, and not forwarding, the intentions of the Legislature, if we were to admit of captious objections as to the manner in which a liability is mentioned in the final account of the trustees. It is sufficient if the liability or the transaction out of which it arises is substantially mentioned, and that it is here substantially mentioned we have no doubt. We must remember that these accounts are not a schedule filed by the Insolvent Trader himself. Though the trustees rely upon him for information as to what transactions he has been engaged in, it is they who frame the accounts. And if they have substantially included in their account the contract made by the insolvent by mentioning payments made by them in

respect of that contract, we think that is sufficient to protect the Insolvent Trader. To hold otherwise would be to defeat the intention of the Legislature.

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Under these circumstances we think that Sir Charles Sargent was right in the decision at which he arrived, and his decision must be affirmed and this appeal dismissed with costs.

Order accordingly.

Attorneys for the Official Liquidator, *Manisty and Fletcher.*
Attorneys for Vináyak Pándurang, *Leathes and Crawford.*

[APPELLATE CIVIL JURISDICTION].

Referred Case.

April 9.

GA'NGJI VITHAL *Appellant.*
SITA'RA'M SHRIDHAR *Respondent.*

Costs as between Pleader and Client—Remedy of Pleader—Quantum meruit—Regulation II. of 1827, Sec. 52—Act I. of 1846, Sec. 7.

The provisions of Regulation II. of 1827, Sec. 52, clauses 1 and 2, and of Act I. of 1846, Sec. 7, regarding the award of pleader's costs by way of a percentage, relate only to costs as between party and party, and (inasmuch as Sec. 52 of Regulation II. of 1827 is, by Sec. 6 of Act I. of 1846, expressly rendered inoperative for any purpose except for the purposes of Sec. 7 of the latter Act) there is not any statutable provision for costs as between pleader and client, so that, in the absence of an agreement between them, the pleader is left to his remedy on a *quantum meruit*.

THIS was a reference made by W. M. P. Coghlan, Judge of the District of Thána, under the provisions of Section 28 of Act XXIII. of 1861.

The reference was considered by WESTROPP, C.J., and LLOYD, J.

The facts fully appear from the judgment of the Court.

WESTROPP, C.J.—This is a reference made to us by the District Judge of Thána under Section 28 of Act XXIII. of 1861, in an appeal to him in a suit brought by a pleader against his client to recover remuneration for professional services rendered to the defendant in a miscellaneous application in an ordinary civil suit.

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We infer from what the District Judge has said that the client Gángji was not represented by the Pleader Sitárám in the suit itself on any other occasion than that of the miscellaneous application when in the lower Court and afterwards in the appeal Court.

The Subordinate Judge at Kalian has, in this suit, now under reference, awarded what both he and the District Judge think to be a fair remuneration for the plaintiff's services, and in so doing has followed two decisions of the late Šadr Adalat—namely, *Hemachul v. Babjee* (a) and *Heerachund v. Jethabhace* (b).

The District Judge, however, entertaining doubts as to the soundness of these decisions, has referred to this Court the question whether it was incumbent on himself to calculate and allow the remuneration of the pleader at $\frac{1}{4}$ th of 3 per cent. on the amount the subject of the miscellaneous application.

Section LII. of Regulation II. of 1827 contained the four following clauses:—

“First.—Each pleader employed in prosecuting or defending *an original suit* shall be entitled to a percentage on the amount sued for, according to the rates specified in appendix (L.) as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled.

“Second.—The remuneration to a pleader employed in prosecuting or defending *an appeal, regular or special*, shall be the same as is above prescribed in the case of an original suit.

“Third.—The above rules shall not prevent an express agreement being entered into between pleader and client, for either a larger or smaller sum than the established fee.

“Fourth.—But if a larger sum than was agreed for between a pleader and client is awarded in costs against the other party, the pleader, notwithstanding his agreement with his own client, shall be entitled to the excess when recovered.”

(a) 4 Morris Rep. 30.

(b) 7 Harrington Rep. 304.

There was a fifth clause relating to the mode in which the pleader's fees should be recovered and not material to the present case.

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It is manifest that the provisions in that Section (52) as to the pleader's right to a percentage are applicable only to the prosecution or defence of original suits or regular or special appeals. The Bombay Legislature seems to have thought that the same pleader would have been employed throughout the suit, and until the decree was not only made, but also fulfilled. In the absence of an express agreement between the pleader and his client, no provision is made as to the rate at which the former should be remunerated in the event of the pleader being only employed, as in the present case, after the decree has been made for the purpose of enforcing in part the execution of it.

The 3rd clause as to special agreements seems to be applicable merely to such cases as the percentage clauses (1 and 2) would have been applicable to, if there were no special agreement, viz., original suits and regular and special appeals.

The 4th clause is the only one which expressly refers to an award of costs as between party and party, and provides that, in such a case, if the sum so awarded exceeds the amount agreed upon between pleader and client, the former, and not the latter, shall be entitled to the excess. The inference to be drawn from this clause, when taken with clauses 1 and 2, is that the award of costs between party and party should be on the percentage principle, and not in any wise regulated by the private agreement subsisting between the pleader and his client.

Act I. of 1846, Section 6, enacted (*inter alia*) that Regulation II. of 1827, Section 52, "shall cease to be enforced excepting for the purpose specified in Section 7 of this Act" (I. of 1846).

Section 7 enacted "That parties, employing authorized pleaders in the said Courts, shall be at liberty to settle, with them by private agreement, the remuneration to be paid for

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their professional services, and that it shall not be necessary to specify such agreement in the Vakalatnama: provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules contained in the Sections of Regulations specified in Section 6 of this Act; and that when costs are *awarded* in other cases the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits."

The first part of that Section (7) is general. It allows the pleader to make, as to his remuneration, a private agreement with his client with regard to professional services in any kind of litigation. But the latter part (the proviso) relating to remuneration by percentage, is applicable only to the awarding of costs between party and party, and not between pleader and client. It, in substance, provides 1st, that when costs are awarded as between party and party, in any regular suit, original or appeal, decided on the merits, the fees shall be calculated according to the percentages given in Appendix L. to Section 52 of Regulation II. of 1827; and 2ndly, that when costs are *awarded* in other cases, *i. e.*, suits or appeals not decided on the merits or miscellaneous applications, the percentage shall be $\frac{1}{4}$ th of what it would have been in a regular suit decided on the merits. This second part of the proviso, as well as the first part of it, is manifestly, when truly construed, limited to the awarding of costs as between party and party.

Hence and inasmuch as Section 52 of Regulation II. of 1827 is, by Section 6 of Act I. of 1846, expressly rendered inoperative for any purpose except the purpose of Section 7 of that Act, there is not any statutable provision for costs as between pleader and client in the absence of an express agreement between them, and the pleader (who stands as regards title to remuneration, rather in the position of an attorney, who is not supposed to work gratuitously, than of a barrister whose labours are supposed to be honorary, and who cannot maintain an action for fees) is left to his remedy on

a *quantum meruit*, to recover such remuneration, as the trouble, to which he has been put, renders it just should be awarded to him.

Such was the principle, as we think most correctly, adopted by the Şadr Adalat in the cases followed, but doubted by the District Judge. In both of those cases, and in a previous case referred to in the first of them, the Şadr Adalat held that the pleader, although he had not made any express agreement, was entitled to remuneration. In *Hemachul v. Babjee* (*suprà*), the Şadr Adalat held that, in meting out the recompense for his labour, the Court might, if it saw fit, adopt, as a guide, the percentages laid down by law for the regulation of costs as between party and party; and in *Heerachund v. Jethabháee* (*suprà*), that it was not incumbent on the Court to adopt that guide, if the circumstances of the case rendered it just that the pleader's deserts should be otherwise gauged. In both of these decisions we concur.

In conformity with these views, and as the amount awarded by the Subordinate Judge of Kalian appears to be a fair sum, under the circumstances of the present case, we hold that his decree and that of the District Judge in affirmance of it, are right, and ought to be upheld, and that the question above stated, as submitted to this Court, should be answered in the negative. Costs, if any, incurred in this reference should be paid by the defendant.

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[APPELLATE CIVIL JURISDICTION.]

Referred Case.

April 9.

MULCHAND, Heir of KA'LIDA'S MANEA'KH-

RAMDEED *Plaintiff.*MOTICHAND HARGOVANDA'S *Defendant.**Heirship—Certificate of Heirship—Production of Certificate.*

A plaintiff suing as the heir of a deceased person is (where a certificate of heirship is necessary to enable him to sue) bound to produce the certificate itself. It is not sufficient for the heir to show that an order has been made directing the issue of such certificate to him.

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UNDER Section XXII. of Act XI. of 1865, Gopálrao Hari Deshmukh, Judge of the Court of Small Causes at Ahmadabad, stated the following case for the opinion of the High Court :—

“ The question is—whether or not a plaintiff can be excused the production of a certificate of heirship, if he shows that the District Judge has directed him to be furnished with one. * * *

The plaintiff has sued the defendant for rent of a house, alleged to be the property of his deceased brother, Kálidás. He produces an order of the District Judge showing that on his application to be recognized as heir and brother of the deceased Kálidás, an order was passed that he be furnished with a certificate of heirship.

The defendant, among other pleas, urges that the plaintiff should take out and produce a formal certificate before the Court, and that the production of an order is not sufficient. He produces in support of his statement a copy of the High Court's order passed on Special Appeal No. 210 of 1868, confirming the decree of the Judge of Ahmadnagar, rejecting Bhowansing's claim on the ground that he did not produce a certificate, though he was allowed by the District Judge to take out one.

The estate of Kálidás is valued at Rs. 24,000 ; a stamp paper of Rs. 480 would be required for a certificate. The plaintiff states that he has not at present the means of laying out this sum.

“ My opinion is that the plaintiff must produce a certificate in order to show that he was recognized as heir by the District Judge.”

The reference was considered by WESTROPP, C.J., and LLOYD, J.

PER CURIAM :—To the question whether or not a plaintiff can be excused the production of a certificate of heirship if he show that the District Judge has directed him to be furnished with one, the Court replies that if such a certificate, though ordered to be given, has not in fact been given, it

will not be sufficient to produce the order, or a copy of it. A reference to *Dámódhár Bápuji v. Zinga* (a) and *Dámódhár Bápuji v. Rarji* (b), and the remarks made upon those cases in 8 Bom. H. C. Rep. 159, and to *Lálchánd Ramdayál v. Guntibái* (c), (with regard to the effect of an order for the issue of letters of administration before the letters themselves are issued,) will show the necessity for the production of the certificate of heirship itself.

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Of course, if a certificate be issued and proved to be lost, the Court is not to be understood as saying that secondary evidence may not be given of it.

The Court holds the opinion of the Judge of the Court of Small Causes of Ahmadabad to be right.

Order accordingly.

S.L.R. 5 Bom. H. C. Rep. 1595.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 522 of 1871.

April 15.

UTAMRA'M MA'NIKLA'L *Appellant.*

DA'MODHARDA'S MA'NIKLA'L *Respondent.*

Minor—Accounts of Guardian—Administration of Minor's Estate—Jurisdiction—Civil Court of District—Act XX. of 1864.

A suit to compel a minor's guardian, appointed under Act XX. of 1864, to account for his administration of the minor's estate, cannot be properly brought in the Court of a Subordinate Judge or in any Court but in the principal Civil Court of the District where the property is situate, if it be in one district; but if it be in more districts than one, then in the principal Civil Court of the district in which the minor has his residence.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of Súrat, in Regular Appeal No. 92 of 1871, confirming the decree of the Subordinate Judge of Balsar.

The special appeal was argued before WESTROPP, C.J., and LLOYD, J., on the 15th April 1872.

(a) 7 Bom. H. C. Rep. A. C. J. 31. (b) *Ibid* 32.

(c) 8 Bom. H. C. Rep. O. C. J. 140, 154, 155,

1872. *Asatey* (with him *Fulchandrá N. MATHUR*), for the appellant, objected that the suit had been instituted in the Court of the Subordinate Judge of Balsar, who had no jurisdiction to entertain it under the provisions of Act XX. of 1864.

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Shrinidharán Náráyan, for the respondent, contended that the Code of Civil Procedure contemplated that every suit should be instituted in the Court of the lowest grade competent to entertain it. The District Court could not in the present case be such a Court, for by the Bombay Civil Courts' Act, the Subordinate Judge at Balsar, or the Subordinate Judge of the First Class at Súrat, would be the Court of the lowest grade. Section XIX. of the Minors' Act authorizes the suit without mentioning any special *forum*, which alone is to entertain it. The suit must, therefore, take the ordinary course.

The facts are fully stated in the judgment of the Court :—

WESTROPP, C.J. :—The defendant, not by virtue of any will or deed, or other instrument in writing, but as a near relative (*viz.*, half brother) of the plaintiff and his two younger brothers, has, under the Minors' Act, XX. of 1864, obtained a certificate of administration, and been appointed guardian of the plaintiff and his two younger brothers, all of whom were minors at the time of the death of their father Mániklál Govindráam. The plaintiff states in his plaint that his father died in Sámvát 1920, and that the plaintiff, having come of age in Sámvát 1925, demanded, on behalf of himself and his two younger brothers, an account of his father's estate, and that the defendant refused to account to him; and the plaintiff prays that the defendant may be compelled to render an account from the date of their father Mániklál's death in Sámvát 1920 down to the present time. The defendant denied that the Subordinate Judge's Court, in which the action was brought, had any jurisdiction in the case, and alleged that the plaintiff had received from the defendant the plaintiff's share of the property, and had executed to the defendant a release for it, and that, with the exception of the plaintiff's share, the property was un-

divided, and the plaintiff had no right to demand an account of the share of his minor brothers.

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The Subordinate Judge held that he had jurisdiction to entertain the suit, but that the plaintiff had given a release to the defendant for his (the plaintiff's) share of the property, which release was binding on him. The Subordinate Judge held, however, that the plaintiff might sustain the suit for an account of the two minors' property, and made a decree for such account accordingly.

On appeal, the District Judge affirmed that decree with costs, but wholly overlooked the question of jurisdiction.

The defendant appealed on the question of jurisdiction, and as to the right of the plaintiff to sustain such a suit, he having no personal interest in it, and the property, except as already mentioned, being undivided.

Assuming that the plaintiff might sustain such a suit in a Court having jurisdiction, and without alleging in his plaint that the defendant has been guilty of any malversation in his office of administrator or manager, as to the necessity for which allegation we give no opinion, we think that such a suit cannot be properly brought in the Court of a Subordinate Judge, or any where but in the principal Civil Court of the district where the property is situate, if it be in one district; but if it be in more districts than one, then in the principal Civil Court of the district in which the minor has his residence. (Sec. 4.)

The first section of the Act states that "the care of the persons of all minors (not being European British subjects) and the charge of their property shall vest in the Civil Court," which is by Section 34 interpreted to mean the principal Court of Original Civil Jurisdiction in the district. It is to that Court only that, in the Mofussil, the right to grant certificates of administration is given by the Act (Sec. 2 *et seq.*). That Court, and no Subordinate Court, has the power, for any sufficient cause, to revoke any certificate granted under the Act, and to compel the person, whose certificate has been so recalled, to make over the property in his hands

1872. to his successor, and to account to such successor for all moneys received and disbursed by him, and also to remove any guardian appointed by the Court. (Sec. 21.)

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It, too, was authorized to impose a fine, not exceeding Rs. 500, on any person who may wilfully neglect or refuse to deliver his accounts or any property in his hands within the prescribed time, and to realize such fine by attachment or sale of the property of the person so refusing, and to imprison the recusant until he consents to deliver such accounts or property. (Sec. 22.)

The same Court only has power to take security from persons to whom certificates of administration are granted (Sec. 12), and in all inquiries or proceedings, held or had by it under the Act, to make such order as to payment of costs by the person on whose application such inquiry was made or proceeding had *or out of the estate of the minor*, or otherwise, as it may think proper. (Sec. 13.)

Section 19, under which it has been contended that this suit is sustainable, enacts that "It shall be lawful for any relative or friend of a minor, at any time during the continuance of the minority, to sue for an account from any manager appointed under this Act, or from any person to whom a certificate shall have been granted under the provisions of this Act, or from any such manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate." That section does not specially mention the Court in which such a suit for an account may be brought, but, having regard to the portions of the Act which we have already referred to, and particularly to the provision with which the Act opens, that the charge of the minor's property shall vest in the Civil Court (as interpreted in Section 34), we have no doubt that the intention of the Legislature was that the action should be brought in the Court which has the charge of the minor's property, and which, if the account taken in that action shows that the Administrator

or manager has been guilty of malversation and ought to be removed from his office, may remove him, and may, in such a suit, enforce the production of books and accounts by fine and imprisonment, and make all necessary orders as to costs, even to award such costs out of the minor's estate to the friend or relative who has brought a beneficial suit for the minor. It may well happen that in such a suit the defendant, if a defaulting manager, may be insolvent and unable to pay costs, and it would be unjust that the plaintiff should not be recouped for his outlay in costs on behalf of the minor.

Where any Court, other than the principal Civil Court, is intended to have jurisdiction under the Act, it is specially so provided in the Act: as, for instance, in the concluding provisos in Sections 2 and 5.

Holding these views, we are of opinion that the decrees of the Courts below must, on the ground of want of jurisdiction in the Court of the Subordinate Judge, be reversed, and that there must be a decree for the defendant with costs of the suit and both appeals.

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[APPELLATE CIVIL JURISDICTION.]

Referred Case.

April 22.

In re KESHAV KA'SINA'TH.

Stamp—Power of attorney—Act XVIII. of 1869, Article 13 Schedule II.—Act VIII. of 1871, Section (a) 33.

For a power of attorney executed under the provisions of Section 33 (a) of the Indian Registration Act of 1871 (Act VIII. of 1871) a stamp of 8 annas is sufficient under Article 13 Schedule II. of the General Stamp Act (No. XVIII. of 1869).

THIS case was stated by the Revenue Commissioner, S. D., under the provisions of Section 41 of the General Stamp Act, for the decision of the High Court, on a reference from the Collector of Púna.

The facts are sufficiently stated in the following letter of the Collector :—

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“Under Section 40 of the General Stamp Act, I have the honor to report, for your revision, the facts of a case involving a difference of opinion between the Collector of Sátára and myself regarding the stamp duty required for a power of attorney to effect registration of a document.

“A power of attorney, duly executed and authenticated according to Section 33 (a) Indian Registration Act of 1871, was given by one Keshav Ganesh to one Keshav Kásináth Gádgil, authorizing him to do every thing necessary for the executant to complete registration of a deed of sale of a house executed by the said Keshav Ganesh in consideration of a sum of Rs. 250. This power was drawn upon a stamped paper of 8 annas value, as required by Article 13 Schedule II. of the General Stamp Act, and was in due course produced before the Sub-Registrar of Wái, who, holding that it required a stamp of the value indicated in Article 18, Schedule II., of the General Stamp Act, impounded the document, and forwarded it to the Collector under Section 23 of the Stamp Act. The Collector of Sátára, concurring in this opinion, forwarded the papers to me for the recovery of the additional money (8 annas) required to make up the stamp duty adjudged to be due.

“Being of opinion that Article 18 does not apply to a power of attorney to perform the act of registering a deed for a principal, and that such power is specially provided under Article 13 of Schedule II. of the Stamp Act, taken in connection with Section 33 of the Registration Act of 1871, I replied that the document appeared to bear a sufficient stamp.

“The Collector of Sátára thereupon forwarded to me the appended copy of a letter addressed to him, as Registrar, by the Registrar General, under date 30th May 1871, in which he expressed the following opinion, concurred in, as he states, by the Commissioner of Stamps :—

- (a) That a power of attorney under Article 13 Schedule II. of the Stamp Act is not sufficient to entitle a person holding it to admit execution of a document.

- (b) That, unless a general power of attorney had been granted, two powers would be required, one under Article 13, and another under Article 18 or 19, according to the value of the matter dealt with.

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"I am of opinion that this ruling is incorrect, and that the ordinary powers of attorney contemplated under Articles 18 and 32 of the second Schedule of the Stamp Act are not recognizable for purposes of Section 32 (Section 34 of the Act, 1866) of the Indian Registration Act of 1871, because Section 33 (Section 35 of Act of 1866) of the said Act describes a special power of attorney which shall alone be recognized, and which seems to have been specially provided for in Article 13, Schedule II., of the General Stamp Act of 1869.

"Furthermore, the argument on which the opinion of the Registrar General, concurred in by the Commissioner of Stamps, (the Collector of Bombay and Superintendent of Stamps, I presume,) is based, appears unsound for several reasons. He says: '*I hold that though admission of execution is incidental to presentation for registration, yet they are two distinct Acts.*' Neither the letter nor the spirit of the Registration Law seems to warrant this conclusion. Part VI. of the Act is headed 'Of presenting documents for Registration.' Its opening Section, 32, lays down that the document may be presented by the executing party or his agent duly authorized by power of attorney, and its closing Section, 35, rules that if any person appear by agent, and the agent admits the execution, the registering officer shall register the document. There is no mention of a second power of attorney being required. There is no mention of a general power of attorney. The term general power of attorney is not found in the Stamp Act (*vide* Sections 13, 18, 19, and 32, Schedule II.). The whole tenor of Part VI. of the Registration Act, and the coincidence of the wording on the margin of Section 32 with the wording of Article 13 of Schedule II. of the Stamp Act, convince me that the words '*to present for registration*' do not mean only the mere act of presentation, but include the further action

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KA'SINA'TH. required to complete registration. Again, how can the ruling objected to by me possibly apply when the value of the matter dealt with is not stated, or when the matter dealt with has no value that can be stated in money?

If you concur in the arguments I have above set forth, I suggest that the case is a proper one to lay before the Honourable Judges of Her Majesty's High Court of Judicature at Bombay under Section 41 of the Stamp Act for a final decision of the question at issue."

The case was considered by WESTROPP, C.J., GIBBS and BAYLEY, JJ., on the 22nd of April 1872.

PER CURIAM :—The Court concurs with the Revenue Commissioner and the Collector of Púna for the reasons assigned by them, that one power of attorney is sufficient under Section 13 of Schedule II. of the Stamp Act in the case submitted for its consideration, and that no further stamp than that of 8 annas under the said Article is required.

[APPELLATE CIVIL JURISDICTION.]

May 1.

Miscellaneous Appeal No. 10 of 1870.

NA'KODA' ISMA'IL valad A'HMED BARUCHA' *Petitioner.*
KA'SSAM valad AZAM DUPLI*Respondent.*

*Assignment of Decree—Application for execution—Civ. Proc. Code,
Sec. 208.*

A person claiming to be the assignee of a decree should apply for recognition of his title to the Court which pronounced the decree and for leave under Section 208 of the Civil Procedure Code to have his name substituted in lieu of that of the plaintiff.

THIS was a miscellaneous appeal from an order of Mukan-drái Munirái, First Class Subordinate Judge at Súrat.

The respondent, Kássam valad Azam Dupli, obtained a decree in the Recorder's Court at Rangoon against one Kássam Mahomed Baruchá and Husen Mahomed Baruchá. On the application of Kássam Dupli, the decree in

question was transferred to the Court of the Subordinate Judge at Súrát, and filed there. After this transfer, Kássam Dupli assigned the decree to the petitioner, Nákodá Ismáíl. On Nákodá Ismáíl applying for execution of the decree, the Subordinate Judge rejected the application on the ground that the assignment was conditional only, and that, therefore, Nacoda was not entitled to execute the decree as assignee before the fulfilment of that condition.

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The appeal was argued before WESTROPP, C.J., and WEST, J. *Shántárám Náráyan*, for the petitioner, Nákodá Ismáíl.

Anstey (with him *Nanábhái Haridás*), for the respondent.

Anstey took a preliminary objection to the hearing of the appeal on the ground that the order passed by the Subordinate Judge of Súrát was not appealable, and contended on the merits that the Recorder's Court at Rangoon was the only Court which, under Section 208 of the Code of Civil Procedure, had jurisdiction either to grant or refuse the application of Nákodá Ismáíl, as assignee, for execution of the decree. He cited *Sheo Narain Singh v. Hurbans Lall*. (a)

Shántárám Náráyan :—It cannot be said that there is no right of appeal under Section 208, because words allowing a discretion are used in that section. Where such words are used, the Code in many cases has expressly provided an appeal. It follows, therefore, that the right of appeal is not taken away where the doing or not doing of a thing is left to the discretion of a Court. On this point, I refer to *M. G. Penulse v. R. S. Múlse* (b) as a case in which it has been held that when discretion is not exercised in a sound and reasonable manner, an appeal lies to a higher Court. An assignee is a party to the suit within Section 11 of Act XXIII. of 1861. (c)

Cur. adv. vult.

WESTROPP, C.J. :—This is an appeal from the order of the First Class Subordinate Judge at Súrát, whereby he

(a) 14 Calc. W. R. C. R. 65; S. C. 5 Bengal L. R. 497.

(b) 5 Bom. H. C. Rep. A. C., J. 94.

(c) 1 Bom. H. C. Rep. 9; 4 Bom. H. C. Rep. A. C. J. 119.

1872. refused to execute, at the request of the present petitioner, a decree of the Recorder's Court at Rangoon, obtained by Kássam valad Azam Dupli (the respondent) against A. BARUCHA' v. KÁSSAM valad A. DUPLI. Kássam Mahomed Baruchá and Husen Mahomed Baruchá, and which decree, at the desire of the plaintiff, had been transmitted for execution to the Súrat Court before the assignment, which shall be presently mentioned. The mode of execution sought was the arrest of the defendant, Kássam Mahomed Baruchá. The decree is alleged to have been assigned to the petitioner by the respondent. The respondent admitted execution of the deed of assignment, but asserted that it had been executed as an escrow to take effect on the occurrence of an event which had not yet happened, and the Subordinate Judge, coming to that conclusion, refused to execute the decree on behalf of the alleged assignee, the petitioner.

On behalf of the respondent, his counsel, Mr. Anstey, contended—1st, that no appeal against such an order as that of the Subordinate Judge lies to the High Court; 2nd, that the petitioner should have applied under Section 208 of the Civil Procedure Code, in the first instance, to the Court of the Recorder at Rangoon which made the decree, for permission, as assignee, to enforce it against the defendants, and that until that permission was given no other Court in British India could enforce it, and that it was a matter completely within the discretion of the Court which made the decree whether or not it should recognize the assignee. On the first point, it is unnecessary that this Court should now give any opinion, inasmuch as it is clearly of opinion that it lay with the Court at Rangoon to decide whether or not the petitioner, as assignee, should be permitted to enforce the decree. This Court thinks that the Court mentioned in Section 208 of the Civil Procedure Code means that Court which pronounced the decree which the assignee seeks to have enforced. There is nothing in that section, or in the sections which form its context, to lead this Court to suppose that Section 208 was intended to apply to any other Court than that which had made the decree, and great con-

fusion might follow if any other Court were to assume the power of deciding whether or not the assignee should be allowed to enforce the decree, as, were that the case, there might be presented the anomaly of the Court which made the decree enforcing it in the name of the original plaintiff, and another Court enforcing it on behalf and in the name of the assignee. This Court concurs on this point, in the decision of Bayley and Markby, JJ., in *Sheo Narayan Sing v. Harbans Lall (d)*, that the assignee of a decree should apply to the Court which pronounced the decree for leave under Section 208 to have his name substituted in lieu of that of the plaintiff. But this Court declines to express any opinion as to there being an *unlimited* discretion on the part of the Court which makes the decree to permit or refuse the application of an assignee for such substitution.

This petition of appeal must (without this Court entering into the merits of the case) stand dismissed with costs.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 26 of 1871.

Jan. 17.

FRA'MJI RUSTAMJI *Appellant.*

RATANSHA' PESTANJI and another..... *Respondents.*

Procedure—Order recognizing assignment of Decree—Final Order—

Appeal—Assignee of Decree—Application for Execution.

An order made by a Court recognizing a person as the assignee of a decree is a final order from which a regular appeal may be preferred.

A person claiming to be the assignee of a decree must apply for recognition of his title to the Court which passed the decree, and not to a Court to which such decree has been transmitted for execution.

THIS application was filed as a miscellaneous special appeal from an order of W. H. Newnham, Judge of the District of Súrat, rejecting an appeal from an order made by the First Class Subordinate Judge of Súrat. The matter was subsequently treated as a regular appeal.

(d) 5 Beng. L. Rep. 497.

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An award between Bái Jáiji and Frámji Rustamji in favor of the former, bearing date the 30th August 1867, was registered on the 23rd of October 1867 in the Court of the Principal Şadr Amín of Ahmadabad. Bái Jáiji, treating the award so registered as a decree, got it transferred to the Court of the Principal Şadr Amín of Súrat for execution, for which he applied on the 13th of November following. The Súrat Court accordingly levied an attachment upon the defendant's property. Whilst the property was under attachment, Bái Jáiji assigned his interest in the award to Ratanshá Pestanji and Nasarvánji Pestanji. The attachment was subsequently removed (the reasons for its removal did not appear), and the assignees on the 29th August 1870 applied to the Court of the First Class Subordinate Judge of Súrat, which had succeeded to the Court of the Principal Şadr Amín, for execution. That Court, after making an inquiry into the genuineness of the assignment, on the 15th of February 1871 made an order recognizing the assignment, and issued a notice to the defendant calling upon him to show cause on the 4th of April following why execution should not proceed. The defendant did not appear as called upon, and the Subordinate Judge ordered the execution to be issued.

From this order Frámji Rustamji preferred an appeal to the District Judge, who on the 18th of July 1871 held that the amount in litigation between the parties being more than Rs. 5,000, no appeal lay to him under Section 26 of the Bombay Civil Court's Act.

On the 24th July 1871 the defendant, Frámji, preferred a memorandum of special appeal to the High Court, which was registered the following day.

On the 18th of December 1871, the case was set down for hearing before MELVILL and KEMBALL, JJ.

Shántárám Náráyan, for the appellant.

Nánábhái Haridás, for the respondents.

Nánábhái Haridás objected to the appeal being heard on the following grounds:—

I.—If this application is in the nature of a regular appeal, no regular appeal lies, as the order appealed against was passed *ex parte*, and the only course for the appellant to pursue is that laid down in Section 119 of the Code of Civil Procedure.

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II.—If an appeal does lie, it is beyond time, as it was presented on the 24th July 1871, and the orders appealed against were made on the 15th February and 4th April 1871.

III.—No appeal lies to this Court.

Shántárám Náráyan :—The appeal is not from an *ex parte* decree. Our object in appealing was to set aside the recognition of the respondents as assignees.

PER CURIAM :—If an appeal lies at all, it lies to this Court, and Mr. Nánábhái will be heard as to whether an appeal lies, and, if so, whether the assignee of a decree is bound to apply to the Court which passed the decree, or to the Court to which such decree has been transferred.

17th January 1872. *Nánábhái Haridás* :—No regular appeal lies. The order of the Subordinate Judge recognizing the assignment was merely an interlocutory order from which no appeal can be preferred; and against the order of the 4th of April, by which execution was allowed to proceed, there can be no appeal, as the defendant, though he had notice to appear, failed to do so.

Shántárám Náráyan :—The order of the Subordinate Judge of the 15th February was final, because it finally decided that the assignees should be recognized. Till this day every thing was unknown to the defendant. On the 15th a notice is issued to him, simply because it happened that the decree had been passed more than a year ago. If an assignment be recognized in this way, it might happen that a satisfied decree might be assigned and the judgment debtor would have to lie by and allow himself to be harassed by proceedings taken by the assignee. According to *Sheo Narayan Sing v. Harbans Lall* (a) the assignee must apply to the Court passing the decree.

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PER CURIAM :—When this case was last before us we decided that an appeal in this matter, if it lies at all, lies to this Court under the provisions of Section 294 of the Code. The decree, if such there were, was transferred to the Court of a Subordinate Judge, First Class, and appeals from his decrees in suits of a value above Rs. 5,000 lie to this Court.

It has been argued that there is no appeal against the Subordinate Judge's order of 15th February, because it is merely an interlocutory order ; but it appears to us that, so far as it recognized the respondents as lawful holders of the decree, it was a final order. It was an order passed after judicial inquiry, though in the absence of the appellant ; and it was merely owing to the accident that more than a year had elapsed since the passing of the decree that any notice to show cause was served on the appellant and that execution did not immediately issue. If an order for execution had been made, the present appellant would have had a right to appeal on the ground that the assignee had no *locus standi* in the Court issuing the process, and that the orders had been made without jurisdiction; and we think that he has the same right under the circumstances of the present case.

As regards the merits of the appeal, we are of opinion that the view taken by the Calcutta High Court in *Sheo Narayan Sing v. Harbans Lall* (b) is correct, and that an assignee of a decree must apply to the Court which passed the decree, and not to the Court to which the decree has been transferred for execution. Under this view the order of the First Class Subordinate Judge of Súrat, dated 15th February 1871, as well as the subsequent order of the 4th April, must be annulled as having been made without jurisdiction.

We do not decide whether there has been any thing like a valid decree, or merely an award which requires a decree to make it capable of execution.

Order annulled with costs on the respondents.

(b) 5 Beng. L. Rep. 497.

[APPELLATE CIVIL JURISDICTION.]

1872.
April 24.*Special Appeal No. 356 of 1871.*

LAKSHMIBA'I, WidowAppellant.

VITHAL RA'MCHANDRARespondent.

*Mortgage—Limitation—Foreclosure Suit—Act XIV. of 1859, Sec. I.
Cl. 12.*

The plaintiff, on the 2nd of August 1847, became mortgagee of a house under an instrument of mortgage, which provided that, in default of payment by the mortgagor of the mortgage loan within five years, the house should be considered as absolutely sold to the mortgagee. Default was made in payment, and the mortgagee entered into possession, and continued in possession until 1858 when he was dispossessed by the mortgagor. On the 20th March 1866 the plaintiff filed a suit, in the nature of a foreclosure suit, against his mortgagor, to which the defendant pleaded the law of limitation.

Held that the plaintiff's cause of action arose in 1858, when he was dispossessed by the defendant, and that he had under Act XIV. of 1859, Sec. I., Cl. 12, twelve years from that date within which to file his suit.

THIS was a special appeal from the decision of A. C. Watt, Acting District Judge of Púna, in Appeal No. 226 of 1867, amending the decree of Krishnáji Vishnu, the Principal Şadr Amín of Púna.

Vithal Rámchandra sued to obtain possession of a house which had been mortgaged to him by the defendant, Náro Bhimá Shankar, under a deed of mortgage dated the 2nd August 1847. The deed of mortgage stipulated that unless the loan was repaid within five years from the date of the deed, the house should pass absolutely to the plaintiff (the mortgagee) as owner.

The defendant, *inter alia*, pleaded that the suit was barred by the law of limitation, as the suit was brought after the expiration of twelve years from the time when the cause of action accrued.

The Principal Şadr Amín found as a fact, that the plaintiff (mortgagee) had been in possession of the mortgaged premises until 1858, and decreed that the house should be delivered to him (plaintiff) unless the defendant paid the amount due on the mortgage, with interest, to the plaintiff.

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 DRA.

In appeal, the decree was confirmed, with a slight modification as to the time when the redemption money was to be paid by the defendant.

The appeal was argued before WESTROPP, C.J., and Lloyd, J., on the 13th December 1871.

Shántárám Náráyan, for the appellant :—The latest date on which the cause of action accrued was the 2nd August 1852, when, according to the terms of the mortgage deed, the property absolutely passed, or was supposed to have passed, to the mortgagee, the respondent. Even supposing the mortgagee to have been in possession till 1858, that would not help him, as he did not avail himself of the provisions of Section 15 of Act XIV. of 1859 to bring a summary suit to recover his lost possession within six months from the date of dispossession: *Dádábhái Narsidás v. Sub-Collector of Broach* (a), *Huro Chunder Goocho v. Gudadhur Koondoo* (b), *Khelut-Chunder Ghose v. Tarachurn Koondoo Chowdry* (c).

Naggindás Túlsidás, for the respondent :—Both the Lower Courts have distinctly found that the mortgagee (plaintiff) was in possession till 1858. The right to sue, therefore, arose in that year, when his possession was disturbed. The omission on his part to avail himself of the summary remedy provided by Section 15 of Act XIV. of 1859 does not change the cause of action. If he had brought such a summary suit, he would have recovered his possession without being put to proof of his title: *Kunhi Komapen Kurupu v. Changarachan Kandil* (d).

Cur. adv. vult.

WESTROPP, C.J. :—This is a suit to recover a house mortgaged to the plaintiff by deed, dated 2nd August 1847, which, in default of repayment of the loan within five years from date, was to become converted into a deed of sale. Such an instrument, conformably to the doctrine of this Court, in *Rámji v. Chinto* (e) is, notwithstanding the expira-

(a) 7 Bom. H. C. Rep. A. C. J. 87. (b) 6 Calc. W. Rep. Civ. R. 184.

(c) 6 Calc. W. Rep. Civ. R. 260. (d) 2 Mad. H. C. Rep. 313.

(e) 1 Bom. II. C. Rep. 109.

tion of the five years on the 2nd August 1852, treated as a mortgage and the property held to be redeemable on repayment of the moneys due on the loan. And, therefore, the District Court treated this suit for possession as owner, as in the nature of a suit for foreclosure. The plaintiff is found by the District Judge to have been in possession so lately as 1858 at least, and the plaintiff himself alleges that he was so until Fálgun Shake 1786, (i. e., until sometime between the 26th February and the 27th March 1865,) at which time he asserts that his cause of action accrued by his dispossession. He filed his plaint against Náro on the 29th March 1866. Náro died on the 2nd July 1870, and his widow, Lakshmi, has been substituted for him on the record as defendant, she being his heir. Both of the Courts below have found that the mortgage was duly executed. The only question argued before us was, whether the suit is barred by Act XIV. of 1859. For the defence, and on behalf of the appellant, it has been contended that the cause of action must be considered as having accrued, if not at the date of the mortgage (2nd August 1847), at the latest on the 2nd August 1852, when the five years mentioned in the mortgage expired, and it became or was supposed to have become absolute, since which time more than twelve years have elapsed. And that the dispossession of the plaintiff in 1858, or at any period between that time and the time named by the plaintiff, Fálgun Shake 1786, (at the latest 27th March 1865) cannot in in such an action as the present, brought, as it is, more than six months after either of the latest mentioned dates, be treated as the cause of action, inasmuch as Act XIV. of 1859 Section 15, must be considered as precluding such a course. The following passage in the judgment of our brother Melvill, in *Dádábhái Narsidás v. The Sub-Collector of Broach* (f), where he speaks of Act XIV. of 1859, Section 15, has been relied upon: "The law has fixed a period of limitation within which a party may recover possession without proof of title. If he allow that period to elapse, he must prove his title." In that passage we concur; but we do not think that it affords any support to the argument for the defend-

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 DRA.

ant, or that it in anywise affects the question as to what should be deemed to be the cause of action in this suit, or when that cause of action accrued.

Section 15 of Act XIV. of 1859 relates to the summary recovery of possession of immoveable property by any person dispossessed "otherwise than by due course of law." It gives to such a person the right to bring a suit within six months after dispossession to recover possession, "notwithstanding any other title that may be set up in such suit," that is to say, the recovery in such a summary suit may be effected without regard to the existence of title in the party who is dispossessed. The same section further provides that "nothing" in it "shall bar the person from whom such possession shall have been so recovered, or any other person instituting a suit, to establish his title to such property, and to recover possession thereof within the period limited by this Act." That period, in such a case as the present, (*i.e.* that of an unpaid mortgagee who was in possession at least until 1858, if not later,) is the period specified in Section 1, Clause 12, *viz.*, "twelve years from the time the cause of action arose." The mortgagee, so long as he was in possession, had not any occasion to sue. He was put out of possession not by due course of law, and it is said that either under Act. XVI. of 1838, or Bombay Act V. of 1864, or Section 15 of Act XIV. of 1859, he might have summarily recovered the possession, and that, not having done so within six months from being dispossessed, he must fall back for his cause of action to the 2nd August 1852 (if not to the 2nd August 1847) when his title accrued. But this is untenable, and arises from a confusion of title and cause of action. It is true that a plaintiff, if he have suffered six months to have elapsed from the period of dispossession without bringing his suit, must, when he does bring it, prove title, and cannot recover without regard to title; but it does not thence follow that his cause of action under Section 12 and the commencement of his title are synchronous. If this were so, a man whose title accrued under a sanad dated fifty-one years ago, and whose possession was uninterrupted

for fifty years from the date of the sanad, and who at the end of that time was dispossessed, and remained out of possession for more than six months, would be barred, because he had not brought a suit within six months from his dispossession, inasmuch as more than 12 years had elapsed from the date of the sanad. The case of a mortgagee, expelled from possession during the continuance of his title as mortgagee, differs in no respect from that of a sanadi-proprietor so expelled. The legislature has not perpetrated any such absurdity or injustice as this. The plaintiff, the mortgagee, had no occasion to sue so long as he was in possession; but when he was dispossessed (which was at all events within twelve years before the filing of his plaint) a cause of action arose, and by Section 1, Clause 12, he has twelve years from that time within which he may bring his suit. In that suit, brought, as it was, more than six months after the dispossession, he was bound to show his title, and has shown a good title as mortgagee; and he was further bound to show a cause of action within twelve years, and he has done so, viz., his ouster from possession within twelve years before suit brought. If he had brought a summary suit within six months after dispossession, he might have done so on easier terms, namely, by simply showing dispossession within that time. But the cause of action (the dispossession) is one and the same in both suits. The existence of a right during six months to sue on easier terms under Act XVI. of 1838, or Bombay Act V. of 1864, or Section 15 of Act XIV. of 1859, does not in anywise affect Section 1, Clause 12, of that Act, or the plaintiff's right to avail himself of it. We fully agree in the opinion thus expressed by the High Court of Madras in *Kunhi Komapen Kurupu v. Changarachan Kandil Chembata Ambu* (g) :—" It (Section 15 of Act XIV. of 1859) was intended not to abridge any rights possessed by a plaintiff, but to give him the right, if dispossessed otherwise than by course of law, to have his possession restored without reference to the title on which he holds and that which the dispossessioner asserts. In cases under that section, a lessor who had dispossessed otherwise than by due course of law a

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(g) 2 Mad. H. C. Rep. 313.

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lessee whose term had expired would be compelled to restore possession to the lessee. The plain object is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the person who has taken the law into his own hands deriving any benefit from the process."

The case of *Huro Chunder Gooho v. Gadadhar Koondoo* (h) and *Khelut Chunder Ghose v. Tarachurn Koondoo Chowdry* (i) have not any application here as neither of the mortgagees in those cases ever had possession.

Mr. Justice Macpherson, in his work on Mortgages, page 152, referring to a case (which seems to have been decided on the law as it stood before Act XIV. of 1859 came into force) in which the mortgage deed treated the mortgagee as already in possession, although in fact he had never been so, says that "it was held that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that, as he had never been in possession, a suit for dispossession by him must be brought within twelve years from the date of the deed."

The same learned author mentions thus, in the same page, another case also apparently decided upon the law as it stood before Act XIV. of 1859 came into force:—"When a lease by way of mortgage was given in consideration of an advance, and the mortgagee held possession for many years, but was afterwards ousted and after a time sued to recover what was due on the loan, with interest, the twelve years, during which his suit would lie, were counted from the time when he was turned out, not from the date of the deed under which he entered." (j)

There seems to us to be nothing in Act XIV. of 1859 to prevent the principle of that case being applicable since as well as before that Act; nor any distinction between the case of an improperly expelled mortgagee and that of any other person having title who has been turned out of possession while his title continued.

(h) 6 Calc. W. Rep. Civ. R. 184. (i) 6 Calc. W. Rep. Civ. R. 209.

(j) S. D. A. 1848, p. 722.

In *Wise v. Bhoobun Moyee Debia Chowdhrainee* (k), 1872.
 where an estate had been sold by auction for arrears of revenue in 1833, and the purchaser was put into possession ; LAKSHMI-
 possession was afterwards restored, in 1840-41, to certain BA I
 adverse claimants—that was merely a summary proceeding, c.
 and the purchaser's representatives were left to their regular VITHAL
 suit to recover the property under their original purchase— RA'MCHAN-
 it was held that the cause of action arose at the date of the DRA.
 dispossession in 1840-41, not at the date of the purchase in 1833.

Section 6 of Act XIV. of 1859, which has been referred to on behalf of the defendant, relates simply to the effect of payments of principal or interest in respect of mortgage debts in keeping alive the right of the mortgagee to sue in Courts established by royal charter to recover the immovable property mortgaged, and does not at all affect the question as to the effect of possession by the mortgagee and a subsequent disturbance of it.

We are equally at a loss to perceive how Act XXIII. of 1861, Section 26, also referred to on behalf of the defendant, can affect this case.

We affirm the decree of the District Judge with costs, with, however, this variation, that the time for payment of the principal moneys found due, and interest and costs, shall be extended to the 24th day of July next, and that, in default of payment of such principal, interest, and costs, including the costs of this appeal, on or before the said 24th day of July next, the defendant shall be for ever barred and foreclosed from recovering the house, the subject of the mortgage, in the plaint mentioned, and the plaintiff (respondent) shall be then put into possession of the said house and declared the owner thereof.

Decree affirmed.

(k) 10 Moo. Ind. App. 1,65, 170 ; S. C. 3 Calc. W. Rep. P. C. 5.

[APPELLATE CIVIL JURISDICTION.]

1872.
June 10.1870.
June 6.*Special Appeal No. 68 of 1870.*

LAKHMICHAND WALCHAND *Appellant.*
 KASTUR BECHAR *Respondent.*

Registration—Unregistered Deed of Sale—Registered Certificate of Sale
—Priority—Act XX. of 1866, Sec. 50.

A subsequent registered certificate of sale of immoveable property by the Court does not take precedence over a prior unregistered deed of sale of the same property where the registration of such unregistered deed is optional under the provisions of the Act.

THIS was a special appeal from the decision of A. Bosanquet, Judge of the District of Tanna, reversing the decree of Mangeshrao Balwant, Subordinate Judge of Murbád.

The plaintiff filed an action to establish his title to a house sold to him on the 3rd of September 1868 by the widow of the proprietor, Ragh Patil, and which house the defendant, on the 20th October 1868, caused to be sold through the Civil Court in execution of his decree against the said Patil.

The defendant, *inter alia*, contended that his title resting, as it did, upon a registered certificate of sale, was, under Section 50 of Act XX. of 1866, superior to that of the plaintiff, whose deed had not been registered.

The Subordinate Judge said "the property had ceased to be Ragh Patil's on the date of the auction sale, and, consequently, the defendant, by purchasing it as Ragh Patil's, has obtained no right thereon. The registration of the certificate granted to the defendant under Section 259 of the Civil Procedure Code will not entitle him to priority under Section 50 of Act XX. of 1866, for the certificate in question is not a document of such a character as to be entitled to priority by virtue of its being registered over the plaintiff's unregistered deed of sale of which the registration was optional: *Fakirchand v. Káhandás.*" (a)

The Subordinate Judge found for the plaintiff on the other parts of the case, and made a decree in his favour.

(a) 3 Bom. H. C. Rep. A. C. J. 107.

The District Judge, in appeal, reversed the decree, on the ground that the registered certificate of sale took precedence over the prior unregistered deed of sale.

1872.

LAKHMI-
CHAND
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BECHAR.

The special appeal was argued before WARDEN and MELVILL, JJ.

Pándurang Balibhadra, for the appellant.

Ganesh Hari Patwardhan, for the respondent.

PER CURIAM :—The plaintiff claims the disputed house under an unregistered conveyance executed by the representative of Ragh Patil, deceased. Subsequently to this conveyance the house was attached and sold in execution of a decree against Ragh Patil, and the usual certificate was granted to the defendant as purchaser, and registered by him. The Judge has held that under Section 50 of Act XX. of 1866, the defendant's certificate being registered takes precedence of the plaintiff's deed, which is unregistered. But it is to be observed that the two instruments do not purport or operate to convey the same property. The plaintiff's deed conveys to him Ragh Patil's entire estate in the house; the defendant's certificate conveys nothing more than such right, title, and interest as Ragh Patil might have in the house at the date of sale, and this would amount to nothing at all, if the previous sale to the plaintiff were valid. Section 50 of Act XX. of 1866 cannot, therefore, be held to be applicable. If a creditor cause to be sold property which does not belong to his judgment debtor at all, the purchaser cannot acquire a title against the real owner by merely registering his certificate.

The decree of the Judge below must be reversed and the case remanded, in order that the Judge may find upon the question of the *bona fides* of the plaintiff's deed of sale and pass a new decree accordingly, awarding costs.

Decree reversed and case remanded.

This ruling was followed in *Ganmall Fakatmall v. Fyzmal Gulabchand* (S. A. No. 257 of 1870), decided by GIBBS and LLOYD, JJ., on the 22nd September 1870, and also in *Shivram*

1872. valad *Amichand v. Pritiraj Kisandas* and others (S. A. No. 33 of 1872), decided by SARGENT, Acting C. J., and MELVILL, J., on the 10th of June 1872.
 LAKHMI-CHAND
 WALCHAND
 r.
 KASTUR
 BECHAR.

[APPELLATE CIVIL JURISDICTION.]

March 11.

Special Appeal No. 552 of 1871.

SAGANGOWDA' bin BASANGOWDA'.....*Appellant.*

BASA'PA' bin CHENA'PA'.....*Respondent.*

Limitation—Suit to recover land in possession of defendant—Accrual of cause of action—Evidence to be adduced by plaintiff.

A suit to recover possession of an unenclosed piece of ground must be brought within twelve years from the time the cause of action accrued, and in deciding this the issue is, not that the plaintiff must show that he exercised some right of ownership over the ground within the twelve years preceding the filing of the action, but that twelve years have not elapsed between the day the defendant interfered with the plaintiff's possession and the date on which the plaintiff filed his claim.

THIS was a special appeal from the decision of Baron D. H. Larpent, Judge of Dharwar, amending the decree of the Subordinate Judge of Gadak.

The plaintiff, a patel, alleged that an unenclosed piece of land was granted to him as an Inam on which to build a house; that in July 1869 the defendant interfered with his possession; that the plaintiff thereupon sued the defendant in the Court of the Mamlatdar, who in October of the same year confirmed the defendant in possession; and the plaintiff, therefore, sued in the Civil Court to obtain possession of his ground. The defendant denied both the plaintiff's title and possession and set up the statute of limitation.

The Court of first instance awarded part of the claim; but the Judge, in appeal, considered it barred by lapse of time. He said that it was for the plaintiff to show that he had exercised some right of ownership over the ground within the twelve years preceding the filing of this action, and, finding that, though the plaintiff attempted to show this by establishing one fact, viz., that within twelve years certain persons

occupied the building which then existed on the ground as the plaintiff's tenants he failed to do so. The Judge threw out the plaintiff's claim.

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SAGANGOW-
DA' BASAN.
GOWDA'T.
BABA'PA'
CHENA'PA'.

The special appeal was argued before GIBBS and LLOYD, JJ.

Dhirajlal Mathuradas, Government Pleader, appeared for the appellant.

Shattaram Narayan, for the respondent.

PER CURIAM :—The District Judge has held this claim to be barred, but in arriving at this decision he laid down the following rule for his guidance :—It is for the plaintiff to show that he has exercised some right of ownership over the ground within the twelve years preceding the filing of this action. Now, as the subject matter of the suit is a piece of open ground, this ruling which, with regard to the possession of houses and the like, might possibly contain all that was necessary, is not correct. In the case of *Pándurang Gorind v. Bálerishma Huri* (a), it was held that although the plaintiff could not prove that he had exercised possession within twelve years previous to filing his suit, his claim would not necessarily fail, but that what he must show was that he sued within twelve years from the cause of action accruing to him against the defendant; in other words, he must show when the defendant interfered with his possession, and that twelve years have not elapsed between that date and the date of filing his claim. Now we are unable in the present case to discover that the Judge has any where in his judgment found when the cause of action accrued, and this omission would appear to have arisen from the fact that neither his attention nor that of the parties was drawn to this most necessary point. The plaintiff in his plaint sets up the date of the Mamlatdar's decision as the date of the cause of action; but that evidently could not be the case, as that decision merely decided that the plaintiff in this suit, who was plaintiff in the summary suit, had not proved that the defendant in that suit, who was also the defendant in the present action, had ousted him within six months previous to his filing his

(a) 6 Bom. H. C. Rep. A. C. J. 125.

1872. **NAGANGOW. DA' BASAN-GOWDA' v. BASA'PA' CHENA'PA'.** **plaint in the Mamlatdar's Court. As the date of the cause of action is not found, we cannot apply the law, Clause 12, Section 1, Act XIV. of 1859, and decide as to whether the suit was filed "within twelve years from the time the cause of action arose."**

The case must be remanded, and the District Judge be directed to re-try the issue of limitation, with reference to the above observations. Should he again find the claim barred, it will suffice, as far as this Court is concerned ; otherwise he must, if he does not arrive at that conclusion, try the case on its merits, and it is for this reason we reverse and remand the case instead of sending down an issue. Costs to follow.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

March 14.

Miscellaneous Special Appeal No. 1 of 1872.

HARI GOVIND JOSHI, purchaser of a decree
held by KRISHNARA'V ANANT JOSHI.....Appellant.
RA'MCHANDRA PA'NDURANG JOSHI, heir of
GANESH RA'MCHANDRA and PA'NDURANG
GANESH, deceasedRespondent.

Decree for sale of immoveable property—Certificate of Sale—Attachment.

A decree for the sale of mortgaged property was attached and sold in execution of a decree. Held that the interest in immoveable property thereunder conveyed to the purchaser was immoveable property within the meaning of Sec. 259 of Act VIII. of 1850, and that a certificate of sale ought to have been granted to the purchaser.

THIS appeal was heard by MELVILL and KEMBALL, JJ.

Vishvanath N. Mandlik, for the appellant:—What the petitioner Hari bought was not a mere paper, but the immoveable property mentioned in the decree : In re *Gorind Ramchandra* decided by Warden and Gibbs JJ. September 1869.

PER CURIAM :—The District Judge speaks of a certificate of sale which has not been registered; but the Court cannot find that the appellant ever received any certificate of sale. A certificate of sale ought to have been granted to him, for what he purchased was not a mere paper on which the decree was written, but the interest in immoveable property which was recoverable under that decree, and such interest must be regarded as immovable property within the meaning of Section 259 of the Code of Civil Procedure. The Subordinate Judge who directed the sale should have given to the appellant a certificate of sale in accordance with that Section, and he should be directed to do so now. The appellant can get such certificate registered, and apply again for execution of the decree. The present order of the District Judge is confirmed.

Order confirmed accordingly.

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HARI
G. JOSHI,
KRISHNA-
RA'V A.
JOSHI
v.
RA'MCHAN-
DRA
P. JOSHI,
GANESH
RA'MCHAN-
DRA
P. GANESH.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 396 of 1871.

Jan. 10.

VALLABH BHULÁ' *Appellant.*
RA'MA', heir of LAKHA' JIVAN, deceased ... *Respondent.*

Suit heard and determined—Civ. Proc. Code Sec. 2—Misdescription of document—admissions.

In 1864 the original plaintiff, Lakhá Jivan, as heir of Fakirá, brought a suit against Jáнки, the guardian of Fakirá, Jivan Jivráj, Jivan Bhulá, and Vallabh Bhulá, to recover a piece of land. The suit was rejected, as it was proved that (though the plaintiff was the heir of Fakirá) Fakira's guardian had mortgaged the land for necessary purposes to Vallábh Bhulá. The plaintiff then sued Vallabh Bhulá for redemption of the mortgaged premises.

Held that the second suit was not barred under Sec. 2 of the Code of Civil Procedure.

Held also that the fact of the document under which Vallabh Bhulá held the land being described in the Court's judgment in the earlier suit as an instrument of sale was not conclusive in the second suit as to the real nature of the instrument.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat.

1872.
 VALLABH
 BHULÁ
 v.
 RA'MA'.

The plaintiff, Lakhá Jivan, in 1864, brought a suit in the Oolpád Munsif's Court against Báí Jánki, guardian of one Fakira, Jivan Jivráj, Jivan Bhulá, and Vallabh Bhulá to recover a piece of land situated in the village of Chapara Bhathá in the Súrat Collectorate. Jánki stated that she, on behalf of her ward, Fakirá, mortgaged it to Vallabh Bhulá on the 20th March 1861. Vallabh Bhulá answered that in this mortgage it had been stipulated, that if the mortgage money was not paid to him within two years from the date of the mortgage, he was to be considered the absolute owner of the property, and that, that time having expired, he had become such an owner. The other defendants were merely tenants of Vallabh Bhulá. The Munsif found that the mortgage had been made by Jánki for necessary purposes, and, therefore, although the plaintiff was the heir of Fakira, his claim to recover as his heir should be rejected. The Munsif's decree was confirmed both in regular and special appeals. The plaintiff, therefore, brought the present suit to redeem this land, alleging that he was entitled to do so under the ruling of the High Court in *Ramji v. Chinto (a)*.

The Court of first instance decided that this suit had already been heard and decided by a Court of competent jurisdiction, and was consequently barred by Section 2 of the Code of Civil Procedure.

The Lower Appellate Court held that this was not *res judicata* and reversed the original decree.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlal Mathurádás, Government Pleader, for the special appellant.

Nagandás Tulsidas, for the respondent.

MELVILL J. :—We think that the view taken by the District Judge is correct.

This action is certainly not barred by Section 2 of the Code. The former suit was an action of ejectment, the present is a suit to redeem. The causes of action are totally

(a) 1 Bom. H. C. Rep. 190.

different. In England they would not even be cognizable by the same Court.

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BHULAL
RA'MA'.

Nor, as a question of evidence, do we think that the judgment in the former suit is conclusive evidence against the plaintiff that the alienation to the defendant has the effect of a sale, and not of a continuing mortgage. The only question before the Courts in that suit was, whether the widow had made the alienation for necessary purposes. It was immaterial for the purposes of that suit whether the alienation was a mortgage or a sale. Neither the issues framed by the Munsif nor by the Judge put the point in issue. No doubt the Courts described the alienation as a sale:—for at that time the decision of the High Court in *Ramji v. Chinto (b)*, had not been published and the general opinion was that a condition of sale in a mortgage deed operated as a foreclosure. But there was certainly no intention of deciding that point, and we think we should be unwarrantably straining the doctrine of estoppel if we were to hold that the casual use of the word sale to describe a mortgage with a condition of sale, was a conclusive judgment that the equity of redemption is barred.

We regard in the same light the argument that the plaintiff is concluded by his own admissions in the former suit. Those admissions amounted to nothing more than this, that, in appealing from the decision of a Court which had spoken of the alienation as a sale, he urged that a Hindu widow had no power to sell, and that the sale was consequently void. Even if this amount to an admission that there had been not only a conditional sale, but an absolute sale, we still think that such an admission does not bind the plaintiff in the present suit. In *Ramshet v. Pandharinath (c)* a division bench of this Court considered “that the Lower Courts were in error in holding that the plaintiff had forfeited the equity of redemption, because he had in another suit, in which the subject of the mortgage was not

(b) 1 Bom. H. C. Rep. 199.

(c) Special Appeal No. 223 of 1860, decided on the 18th November 1860.

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v.
RA'MA'.

at issue, made an admission that the mortgaged property had been sold to the mortgagee, their decisions being based solely upon this admission, and not on any proof of there having been any *bonâ fide* sale of the property by any special agreement between the parties. The admission of the plaintiff was merely in accordance with the interpretation given to the law of mortgage at that time by the Courts in this Presidency, viz., that if property was not redeemed within the period fixed for foreclosure, the mortgagee acquired a proprietary title to it." It may be said that ignorance of the law excuses no man, and that the plaintiff cannot avoid the effect of his admission by the plea of mistake. But, granting this, we should still say that it is not every admission made in a judicial proceeding which is binding on a party in a subsequent suit. The rule of law on this point is stated, and we think correctly, by the Judges of the Madras High Court in *Civa Rau Nanaji v. Jevana Rau et al* (d):—"Mere statements for the purposes of a particular judicial proceeding can only be conclusive evidence in another proceeding, as to such material facts embodied therein as must have been found affirmatively, to warrant the judgment of the Court upon the issues joined." For the reasons which we have already stated, with reference to the former suit between the present parties, it was not necessary to warrant the judgment of the Courts, that it should have been found affirmatively, that the alienation to the defendant operated as an absolute sale.

We confirm the decision of the District Judge with costs on special appellant.

Decree confirmed with costs.

(d) 2 Mad. H. C. Rep. 81.

[APPELLATE CIVIL JURISDICTION.]

1872.

May 23.

Special Appeal No. 608 of 1871.

SHANKARBHA'I GULA'BHHA'I and

others..... (Defendants) Appellants.

KA'SSIBHA'I VITHALBHA'I..... (Plaintiff) Respondent.

Mortgage—Redemption after fixed time has expired—Gahan lahan clause.

Since the decision of the case of *Ramji v. Chinto*, it has been the practice of the High Court on its appellate side and of the inferior Courts in the Bombay Presidency to treat *gahan lahan* mortgages (mortgages containing a proviso that if not redeemed within a certain fixed time they will be considered as converted into absolute sales) as redeemable, notwithstanding that such fixed time has expired—Such practice has proved beneficial and should be adhered to.

Ramji v. Chinto and the cases decided in accordance with it referred to and followed.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge of the District of Ahmadabad, in appeal Suit No. 562 of 1869, affirming the decree of the Munsif of Nariad.

The facts sufficiently appear from the judgment of the Court.

The special appeal was argued before WESTROPP, C.J., and GIBBS and WEST, JJ.

Nanabhai Hariddas, for the appellants.

Nagundas Tulsidass, for the respondents.

WESTROPP, C.J.:—This is a suit to redeem a mortgage.

Before the institution of this suit twelve years had expired since the day named in the mortgage, upon which, in default of payment, it was to become converted into a sale.

The defendants put forward as valid a deed (exhibit No. 7) whereby the mortgagor was represented as selling the equity of redemption to the mortgagee, but the Judge found the deed to be not genuine. By that finding this Court is bound on special appeal, so no question arises upon the deed of sale (exhibit No. 7).

*Overruled**Mumburgawny**Modally**Hawain**Routten**J.L.R.**1 Mad. 1.**N.R. 2 Bom. p. 113.**N.R. 2 Bom. p. 113.*

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BHA'I
GULA'BHAI
v.
KA'SSIBHA'I
VITHAL-
BHA'I.** However, it was contended for the defendants, the mortgagees, that the mortgage itself became converted into a sale on default of the mortgagor to repay the money borrowed upon the day named for that purpose in the deed of mortgage.

The recent decision (in 1871) of the Privy Council in an appeal from the late *Şadr Adalat* of Madras, *Pattabhiramier v. Vencatarow Naicken* (a), was cited for the mortgagees, in which it was held (in reversal of a decree of the *Şadr Adalat*) in a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption within a time certain, that in the Presidency of Madras, effect must be given to that clause and that the mortgagor ought not to be permitted to redeem after the day for payment has passed. That appeal was pending for an inordinately long time (ten years) and was eventually heard *ex parte*, there not being any appearance on behalf of the respondents.

The High Court of Madras has, in several reported cases, permitted redemption of such mortgages after the day named for payment had passed, in default of which payment the instrument of mortgage had stipulated that the transaction should cease to be a mortgage and should become an absolute sale: *Venkata Reddi v. Parvati Ammal* (b), *Vanneri v. Patanattil* (c), *Nallana v. Palani* (d). The first of these cases was decided in 1863—the two latter cases in 1865. None of the three are mentioned in the Report of the Privy Council case as having been cited by counsel, or referred to by their Lordships.

The question here resolved itself into this, whether, as a result of the Madras case, in which leave was given by the Privy Council to appeal in 1861, and which was not decided until 1871, the practice established in Bombay in 1864 by *Ramji v. Chinto* (e) ought to be discontinued.

We have, after much consideration, arrived at the conclu-

(a) 7 Beng. L. Rep. 136. (b) 1 Mad. H. C. Rep. 460.
(c) 2 *Ibid* 382. (d) 2 *Ibid* 420. (e) 1 Bom. H. C. Rep. 190.

sion that no such consequence ought to follow the final decision of the Madras case, and that none such was intended by the Privy Council.

Their Lordships, after stating that such contracts had been enforced in India, said (f) :—"If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation or on established practice."—After referring to certain Madras and Bengal regulations and to some cases, they continue :—"Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the lower Courts of Madras" (p. 142) ; and lastly they say :—"Such a doctrine the (English equitable doctrine that the time stipulated in the mortgage deed is not of the essence of the contract) was unknown to the ancient law of India ; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decisions. In fact, the weight of authority seems to be the other way. *It must not, then, be supposed that in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions, so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon.*"

Those concluding words are of great importance.

Ramji v. Chinto was decided by Arnould, Acting Chief Justice, and Newton and Janardhan, J.J., in 1864. It is correctly stated in the judgment that the Bombay Şadr Adalat "as a rule gave a strict operation to instruments of this nature" (i. e. mortgages with a *gahán lahán* proviso), "and regarded the right of redemption as extinguished, and the right of property absolutely transferred, the moment the fixed time of payment had expired" without payment having been made.

(f) 7 Beng. L. Rep. 140, 141.

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1872. The decision of the Madras Şadr Adalat in *Pattabhiramsier*
 SHANKAR- v. *Vencatarow Naicken*, in favour of redemption was not appa-
 BHA'I
 GULA'BBHA'I rently cited in *Rámji v. Chinto*, but *Venkata Reddi v. Parvati*
 v.
 KA'SSIBHA'I *Ammal*, decided in 1863 by the High Court of Madras, was
 VITHAL- cited and relied upon by the Court.
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The recognition of the right to redeem was, having regard to the previous decisions of the Şadr Adalat, perhaps somewhat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been Judges of the Şadr Adalat, regretted that their predecessors in the Şadr Adalat had, for the most part, enforced the condition for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the Mofussil. In the island of Bombay itself, the Courts (Mayor's Court, Recorder's Court, Supreme Court, High Court, Original Jurisdiction), although in matters of contract and succession bound to administer to Muham-madans and Hindus their respective laws, have invariably refused to enforce such conditions, and have acted upon the practice of English Courts of Equity in allowing redemption. Holding the views which I have mentioned, and encouraged by the example of the High Court at Madras, all of the Judges sitting at the Appellate Side, including some former occupants of the bench of the Şadr Adalat, were desirous that the course, which was adopted by the Judges who sat in the case of *Rámji v. Chinto*, should be the rule of future practice in the Mofussil.

That rule has, ever since the decision in *Rámji v. Chinto*, been uniformly and steadily acted upon, tempered, however, as it was in *Rámji v. Chinto*, by requiring the redeeming mortgagor, when the mortgagee, under the impression that he had become absolute vendee, had laid out money on the mortgaged premises for their improvement, to recoup the mortgagee to the extent of the value of such improvement, at the time of redemption: *Anandráv v. Rávi* (g); and ex-

(g) 2 Bom. H. C. Rep. 214.

9LR2 Bom. (223)

penses connected with the Revenue Survey have also been so allowed : *Bápushá v. Ramji* (h).

Kedári v. Atmáram (i), from Wái in the district of Sátára, in which *Rámji v. Chinto* was followed in 1866, is an example of the oppression exercised by money-lenders. The decision there made by myself and TUCKER, J., however, partly rested on the ground of fraud.

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In *The heirs of Husen Beg v. Akúbái* (j) decided in 1865 by COUCH and WARDEN, JJ., which was from the Púna District, *Rámji v. Chinto* was followed ; so too in *Muhammad v. Ibráhim* (k) in 1866, by TUCKER and WARDEN JJ., which was from Ratnagiri District ; also in 1868 by COUCH, C.J., and NEWTON, J., in *Mancharshá v. Kamrunisá* (l). They there held that the mortgagor could redeem only on the condition of repaying to the mortgagee the expense of rebuilding a portion of the premises which had been accidentally burnt down, although that expense was more than double the price for which the premises had been conditionally sold to the mortgagee ; [see further as to allowance for repairs *Rágho v. Anáji* (m)].

These are the reported cases in which the High Court of this Presidency has decreed redemption of *gahán lahán* mortgages.

The unreported cases are much more numerous. We do not profess to give by any means an exhaustive list, but amongst them are the following :—

Special Appeal No. 717 of 1863 (*Sadáshiv Vithal v. Dashrath Sadáshiv*) decided by COUCH and NEWTON, JJ., on the 5th of October 1864, decreeing redemption on payment, within six calendar months, of principal, interest, and costs, and money laid out by the mortgagee in buildings or other permanent improvements, making all just deductions for depreciation in such buildings and improvements by lapse of time or other causes, and in default of payment within

- (h) *Ibid* 220. (i) 3 Bom. H. C. Rep. A. C. J. 11.
(j) 2 Bom. H. C. Rep. 337. (k) 3 Bom. H. C. Rep. A.C.J. 160.
(l) 5 *Ibid* 100. (m) *Ibid* 116.

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BHA'I.** that time, foreclosure, or sale at option of mortgagor. The mortgagee to be paid the amount due to him for principal, interest, costs, buildings, and improvements out of the proceeds of sale, and the surplus, if any, to be paid to the mortgagor (plaintiff).

Special Appeal No. 182 of 1865 from Ahmadabad District (*Hukābhāi v. Khodābhāi*) a similar ruling was made by FORBES and NEWTON, JJ.

Special Appeal No. 762 of 1865 (*Gopālrav v. Bhimráv*) from Dharwar, in which TUCKER and WARDEN, JJ., in 1866, decreed against a mortgagee in possession an account of rents and profits received, and on the other side an account of principal and interest, and on payment of balance by mortgagor, within six calendar months, redemption, and in default, foreclosure.

In Special Appeal No. 893 of 1864 (*Vināyak v. Bhivā*) from the Konkan, COUCH, C.J., and TUCKER, J. in 1866, made a similar decree.

Special Appeal No. 764 of 1865 (*Rāyappā v. Krishnāji*) from Dharwar, in which WARDEN and GIBBS, JJ., in 1866, decreed redemption on payment of principal and interest, and in default, foreclosure.

Special Appeal No. 772 of 1865 (*Appāji v. Revu*) from Púna, in which SAUSSE, C.J., and NEWTON, J., in 1866, decreed redemption on payment of principal and interest within six calendar months, and in default, foreclosure.

In Special Appeal No. 125 of 1866 (*Naráyanbhat v. Dinkar*), TUCKER and WARDEN, JJ., in 1866 held the mortgagor entitled to redeem, though more than twelve years had elapsed since the time fixed for payment of the mortgage money.

In Special Appeal No. 651 of 1865 from Púna, redemption was decreed, and compensation to the mortgagee for improvements was directed to be paid by the mortgagor.

Special Appeal No. 218 of 1866 (*Krishnāji v. Hanmant*) where TUCKER and GIBBS, JJ., in 1866 affirmed the decree of the District Judge of Súrat for redemption of a mortgage of 38 years' standing.

In Special Appeal No. 382 of 1866 (*Dulápá v. Sangápá*) from Dharwar, Tucker and Gibbs JJ., in affirming a decree awarding possession of the mortgaged premises to an unpaid mortgagee, recognized the right of the mortgagor to redeem on payment of the amount due on the mortgage.

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Special Appeal No. 308 of 1867 (*Jámásji v. Maulvi Muham-mad Sáheb*), in which Warden and Gibbs, JJ., affirmed the decree of the District Judge of Súrat, which affirmed that of the Principal Sadr Amín awarding redemption after expiration of the period fixed for repayment of the mortgage money.

Special Appeal No. 311 of 1867 (*Uderám v. Kalápá*) from Ahmadnagar, in which Couch, C.J., and Newton, J., in affirming a decree of the District Judge awarding possession to a mortgagee, did so expressly subject to the mortgagor's right to redeem, although the mortgage was *gahán lahán*.

Special Appeal No. 75 of 1868 (*Tátíá v. Rámkisangir*) from Púna—a strong case—Newton and Tucker, JJ. decreed redemption.

In Special Appeal No. 166 of 1868 (*Sakhárám v. Mor Joshi*) from the Konkan, redemption was decreed by Warden and Gibbs, JJ., although more than twelve years had elapsed from the time fixed for repayment of the mortgage money.

In Special Appeal No. 305 of 1869 from Púna (*Ránu v. Ramábái*), Warden and Lloyd, JJ., sanctioned a decree for redemption of two fields out of three. The third they held to have been surrendered by a *rázinámá* to the Collector in favour of the mortgagee by the mortgagor. The Senior Assistant Judge at Púna had decreed redemption of all three fields.

In Special Appeal No. 285 of 1869 (*Ránu v. Esáji*) GIBBS and MELVILL, JJ.) affirmed a decree of the Assistant Judge at Púna which affirmed a decree by the Munsif of Juner for redemption.

Special Appeal No. 75 of 1869 (*Rávji v. Pradhán Jivan Thakar*) was a case in which the mortgagee had held the land for more than twelve years after the day fixed for repayment

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of the mortgage money, and had built a house upon the land. The Munsif of Kalian dismissed the mortgagor's plaint for redemption. The Assistant Judge at Tanna reversed that decree, and made a decree for redemption, but on the condition of the mortgagor paying to the mortgagee the value of the house as well as the debt. The High Court (GIBBS and LLOYD, JJ.) refused to allow compensation for the house, inasmuch as the mortgagee had built it before the time fixed for repayment of the mortgage debt had arrived. On that point, they referred to 2 Bom. H. C. Rep. 225. They decreed redemption on payment of the money due, and directed the mortgagee to remove the house and restore the land to its original condition at the date of the mortgage.

In Special Appeal No. 223 of 1869 (*Rámshet v. Atmárám*) from Tanna, the mortgagor was, by Warden and Lloyd JJ., (who reversed the decrees of the Lower Courts,) held to be entitled to redeem, not only notwithstanding an admission which he had made before the institution of the suit, and that considerably more than twelve years had passed since the day named in the *gahán lahán* clause for repayment, but also notwithstanding that the mortgagee had sold it in 1855 as his absolute property, and that it had been twice afterwards sold in 1862 to the knowledge of the mortgagor, who took no steps then to claim it as his property. Certain issues having been directed by Warden and Lloyd, JJ., the case came up again upon a special appeal, No. 498 of 1870, [as *Rámshet v. Pandharináth* (n)] to the High Court before GIBBS and WEST, JJ., who doubted* but could not interfere with the previous decision in the High Court, which recognized the mortgagor's right to redeem under the special circumstances of the case. They, however, refused to direct any account of rents and profits against the mortgagees. They upheld an award of compensation to them for improvements; but ruled that no interest could be awarded on that compensation, though interest might be given on money expended in

(n) 8. Bom. H. C. Rep. A.C.J. 230.

* Note.—See however, *Vallabha Bhulá v. RámáSukhá*, S. A. No. 396 of 1871,

repairs. I refrain from expressing an opinion as to whether I could have concurred in allowing redemption in that case.

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Sir Charles Sargent and Melvill, JJ., affirmed, in Special Appeal No. 456 of 1869 (*Jivanji v. Hanmantá*), the decrees of the Lower Courts granting redemption, although more than twelve years had elapsed since the expiration of the time allowed by the *gahán lahán* clause for redemption, and held that clause 15, and not clause 12, of Section 1 of Act XIV. of 1859 was applicable to the case.

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In Special Appeal No. 187 of 1870 (*Sarráji v. Nanbáji*) Gibbs and Kembball, JJ., affirmed a decree of the Joint Judge of Púna, granting redemption after expiration of the times specified for repayment in the *gahán lahán* clauses in certain mortgages.

In Special Appeal No. 37 of 1870, Gibbs and Melvill, JJ., affirmed decrees of the Munsif of Talegam and Assistant Judge of Puna, granting redemption, notwithstanding that the time specified for payment had elapsed.

In Special Appeal No. 497 of 1870 (*Krishnáji v. Anandráv*) from Púna, Gibbs and Melvill, JJ., decreed redemption on payment, within six calendar months, of the mortgage money, and Rs. 1,000 compensation for value of fruit and *Bábul* trees planted by the mortgagor.

In the year 1871 and in the current year there have been several decrees made in the High Court at its Appellate Side for redemption of mortgages (like those in the cases already enumerated) by way of conditional sale (*gahán lahán*).

Enough has been said to show how completely the practice of allowing redemption has been established by the High Court of this presidency at its Appellate Side in such cases.

Numerous as are the decrees, which have been made in it for redemption of *gahán lahán* mortgages (and there has not been any appeal to the Privy Council from any of them), they are as nothing compared to the number of decrees to the same effect which, during the last eight years, have been made in pursuance of the practice of this Court

1872. through the Courts of the District Judges, Joint Judges,
 SHANKAR- Assistant Judges, and Subordinate Judges, in all some ninety
 BHA'I Courts or upwards subordinate to this Court, and with
 GULA'BHA'I jurisdiction to hear redemption and foreclosure suits. Such
 r. decrees for redemption must have been made in many hun-
 KA'SSIBHA I dred, probably in thousands, and it would create general
 VITHAL- confusion throughout this presidency, were we now to revert
 BHA'I from the rule laid down in 1864 in *Rámji v. Chinto* to the
 practice of the Şadr Adalat.

We believe that their Lordships of the Privy Council, with their wonted caution, expressed themselves in the manner in which they did, in the passages quoted by us from the appeal from Madras in the commencement of this judgment, in order to prevent any such consequences, and to show that it was not their desire, by their decision, to disturb any such widely established practice as we have shown to exist here.

We believe, therefore, that we shall best give effect to their Lordships' intentions by adhering, as we purpose henceforward to do, to that practice which, on the whole, we have no doubt, has been highly beneficial to the people of this presidency.

We observe that their Lordships made no reference in their judgment to this presidency, or to the practice which has been firmly established in it for the last eight years.

For these reasons, we hold the appellants to have failed on the first point made in their memorandum of appeal. The second and third points were scarcely mentioned by their pleader, and are, in our opinion, of no avail to the appellants.

No objection having been taken to the details of the decree of the Extra Assistant Judge, we affirm it with costs.

[APPELLATE CIVIL JURISDICTION.]

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May 23.*Special Appeal No. 85 of 1871.*KRISHNA'JI alias BA'BA'JI KESHAV..... *Appellant.*RA'VJI SADA'SHIV and another *Respondents.**Mortgage—Conditional Sale—Redemption by mortgagor—Limitation—
Act XIV. of 1859, Sec. I cl. 15.*

Redemption by the mortgagor of mortgaged premises held by a mortgagee under a *gahán lahán* mortgage is not barred by the mortgagee's possession of the premises for the period of twelve years after the date on which according to the terms of the mortgage deed, the mortgage is to be converted into a sale. Such a case is governed by the provisions of Act XIV. of 1859 Sec. I cl. 15.

THIS was a reference to the full bench by Melvill and Kemball, JJ., of the question whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is to be converted into a sale.

It is unnecessary for the purpose of this report to set out the facts of the case out of which the above question arose.

The reference was argued before WESTROPP, C.J., GIBBS, LLOYD, and KEMBALL, JJ. on the 29th of January 1872.

Shántárám Náráyan, for the appellant.

Bahiravnáth Mangesh, for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:—The question referred to us for decision by MELVILL and KEMBALL, JJ., is whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is converted into a sale. The learned Judges observed that the ruling in Special Appeal No. 735 of 1864 (as mentioned in the note to the 12th clause of section 1 of Act XIV. of 1859 in West's Acts) was in conflict with the decision made on the 17th of January 1870 in Special Appeal No. 456 of 1869.

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We have examined the record in Special Appeal No. 735 of 1864, and find that, although one of the points made on special appeal had reference to the time within which redemption might be made, yet that the special appellant, who was appellant in the Court of the District Judge, had not raised that point in the District Court, the questions there being (1) whether the full consideration of the alleged mortgage had been paid; (2) whether, if not, that would vitiate the sale; and (3) whether the Munsif was right in holding two specified *thikāns* to be one and the same field. The decree of the District Judge upon those points was simply affirmed by the High Court, and there is nothing to show that it permitted the point as to the time within which redemption might be had to be argued. We cannot, therefore, consider that case as an authority on the question of limitation.

In Special Appeal No. 893 of 1864 (*Vintyak Anant Bendre v. Bhivā bin Amrutā*) more than twelve years and less than sixty years had elapsed from the date named on which the mortgage was to become a sale in the event of non-payment of the mortgage money. Mr. Pinhey, the District Judge affirmed a decree of the Munsif, dismissing a suit by the mortgagor to redeem. The High Court (Couch, C. J., and Tucker, J.), following *Rāmji v. Chinto (a)*, reversed the decrees of the Courts below, remanded the suit, ordered an account to be taken, and directed that the usual decree for redemption should be made by the lower Court.

In Special Appeal No. 125 of 1866 (*Nārāyanbhat v. Dinkar Ganesh Ok*), the Agent for Sardārs, having held that clause 12 of Section 1 of Act XIV. of 1859 was applicable to a case similar to that above mentioned, the High Court (Tucker and Warden, JJ.), on the 17th of August 1866, reversed his decree, and declared that the proper period of limitation was that prescribed in clause 15 of Section 1 of Act XIV. of 1859.

WARDEN and GIBBS, JJ., in *Sakhārām v. Mor Joshi* (Special Appeal No. 166 of 1868) from the Konkan, decreed redemption, although more than twelve years had elapsed from the day fixed for payment.

(a) 1 Bom. H. C. Rep. 109.

Special Appeal No. 75 of 1869 (*Ráuji v. Pradhán*) mentioned in the judgment given to-day in *Shankarbhai v. Kasanbhai*, is another case to the same effect.

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In Special Appeal No. 456 of 1869 (*Jivanji Bhikaji v. Himmatráam Harirám*), the High Court (SARGENT and MELVILL, JJ.) upheld a decree of Mr. Ayerst, Acting Assistant Judge at Surat, to the same effect.

A still stronger case than any of the foregoing decisions is that in Special Appeal No. 229 of 1869 by Warden and Lloyd, JJ., who reversed a decree of Mr. Bosanquet, who had refused to permit a mortgagor to redeem land mortgaged in 1844 for five years, with the usual clause that in default of payment within that time, the mortgage should become a sale. Three years after the date of the mortgage the mortgagee entered into possession, and in 1850 the mortgagor had, in another suit brought by one Atmárám, in which the mortgagor was defendant, stated that he had sold the land in question here to the mortgagee. The mortgagor brought his suit for redemption in 1867. The High Court, being of opinion that what the mortgagor had said in 1850 was said with reference to the law as then viewed by the Šadr Adálat, and was not any admission of an actual *bona fide* sale, held the mortgagor entitled to redeem.* As to the legal effect of what the plaintiff there had said in 1850, it is unnecessary that, in the present case, we should give any opinion.

The question put to this Full Bench, on the examination of the records of the Court which we have made, seems to be already closed by authority. It has, however, been contended on behalf of the defendant, the mortgagee, that the last four cases are corollaries to the case of *Rámji v. Chinto (b)* which has itself been seriously questioned on the authority of a recent decision of the Privy Council in an appeal from Madras, and that if *Rámji v. Chinto* fall, they must fall with it. No doubt that would be so; but, on reconsi-

(b) 1 Bom. H. C. Rep. 199.

* Note.—See *Valubh Bhukt v. Rámá Lukha* (Special Appeal No. 396 of 1871.

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deration of *Rámji v. Chinto* in Special Appeal No. 608 of 1870 (*Shankarbhai v. Kasanbhai*) by Full Court, it has been determined, for the reason given in a judgment delivered to-day, that the doctrine in *Rámji v. Chinto* must be upheld in this presidency.

The principle on which *Rámji v. Chinto* was decided being *once a mortgage always a mortgage* (c), namely, that the *gahán lahán* clause or stipulation for sale, conditional on default of payment within a fixed time, shall not be permitted to operate as a sale, but that the property, which has been pledged in security for the debt, shall still continue to be redeemable, it is impossible for the Court to hold that the instrument is not a mortgage. If it be a mortgage, it comes within Clause 15 of Section 1 of Act XIV. of 1859 (which specially prescribes the time within which mortgages shall be redeemable) and is taken out of the general clause (12) as to the period of limitation within which suits relating to immoveable property may be brought. Until the arrival of the period fixed for payment, the mortgagor, without the consent of the mortgagee, cannot, in the absence of circumstances or language indicating a contrary intention, redeem the mortgaged premises: *Sakháram v. Vithu* (d).

The period, within which that right to redeem (in England styled the equity of redemption) may be exercised, is, by clause 15 of Section 1 of Act XIV. of 1859, fixed, in the case of moveable property, at thirty years, and in that of immoveable property, at sixty years, from the time of the deposit, pawn, or mortgage, or if, in the meantime, an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depository, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing.

That being thus specially fixed by express provision of the Legislature, the Courts would legislate to the contrary, were they to fix twelve years from the time at which the right to redeem commenced, namely, the day fixed by the (c) *Newcount v. Bonham*, I. Vernon 7. (d) 2 Bom. H. C. Rep. 225.

mortgage for payment, as the period of limitation for suits to redeem under such circumstances as those mentioned in the question put to us.

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On principle then, as well as upon authority, we hold ourselves bound to answer the question referred to this full bench, "whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is to be converted into a sale," in the negative.

We remit this cause (with the above answer) to the Second Division Bench for disposal.

NOTE.—On the same day a similar answer was given to the same question in Special Appeal Nos. 86 of 1871 and 107 of 1871 referred to a full bench.

J.L.R. 2 Ben 128.

*J.L.R. 5 Ben: p. 128.
J.L.R. 3 Ben: p. 223.*

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 458 of 1869.

May 23

NA'RA'YAN and others..... *Appellants.*

SATVA'JI and others *Respondents.*

Hindu law—Mortgage—Interest exceeding principal—Dāmdupat—Reg. V. of 1827 section 12.

According to the Hindu law of *dāmdupat* interest exceeding the principal sum lent cannot be recovered at any one time.

Cases bearing upon the subject of *dāmdupat*, and how far and when that law is applicable to loans upon mortgage reviewed and considered.

THIS was a Special Appeal from the judgment of the Joint Judge at Poona.

The facts sufficiently appear from the judgment of the Court.

The Special Appeal was argued before WESTROPP, C.J. and WEST, J.

Ganpatráv Bháskar, for the appellants.

Shántarám Náráyan, for the respondents.

Cur. adv. vult.

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SATVAJI. WESTROPP C.J.:—This is a suit for redemption of two fields mortgaged by the plaintiff's father to the deceased defendant.

The first mortgage was dated 7th July 1834. It was for Rs. 401 Chándvad currency. The important parts of it shall be hereafter stated.

The second mortgage (exhibit No. 7) was dated 21st November 1834, and was for Rs. 425 of the same currency repayable in one year from date. The interest reserved was Rs. 2 per cent. per mensem. This mortgage was, by way of further charge, of the same land and refers to the previous mortgage. The mortgagors also personally undertook to pay the principal and interest.

The third bond (exhibit No. 8) was dated 12th May 1837, and was for Rs. 240 repayable within two years with interest at 2 per cent. per mensem. It was by way of further charge on the land, and contained a promise on the part of the mortgagors to be personally responsible for the money.

The Principal Sadr Amin had, as regards interest, applied the rule that the interest could not be allowed to exceed the principal. He found in favour of the genuineness of only two of the mortgages.

On appeal, the Joint Judge held that that rule did not apply to mortgages. He found all three mortgages to be genuine, and decreed redemption on payment, within six calendar months, of Rs. 7,458-1-3 on account of principal and interest on account of these mortgages, and, in default, foreclosure.

On special appeal to this Court by the plaintiffs, the argument was limited to the principle on which interest should be calculated. The currency, it was admitted, should be *Chándvad*.

By Hindu law the amount of interest recoverable at any one time cannot exceed the principal: Manu, Ch. VIII. pl. 151; Mayukha, ch. V. Section 1, pl. 7; Steele, 78,263 (1st Edn.); 1 Dig. 52. pl. XLI. XLIII.; Reg. V. of 1827

Section XII. This is called the rule of *dāmdupat*. It is still in force: *Dhondu v. Nārāyan* (a), notwithstanding Act XXVIII. of 1855, which, it has been decided, has not abrogated the Hindu law in that respect: *Khushālchand v. Ibrāhim* (b), *Rāmkrishnabhāi v. Vithobā* (c) and see per PEACOCK, C.J., in *Ramlal Mookerjee v. Haran Chandra Dhar* (d). Mr. Justice Phear has expressed some doubts as to the dicta of PEACOCK, C.J., in the last mentioned case (14 Calc. W. Rep. 308) and see *Annaji v. Ragubal* (e). In this Presidency, however, the question must be considered as settled by the Bombay cases already cited and by *Hukmā v. Memon Ayab* (f) and *Pāndurang Ganesh v. Krishnarāv Anant* (Special Appeal No. 663 of 1864). In the latter case COUCH and WARDEN JJ., on the 25th of January 1865, affirmed the decree of Mr. Gonne, Acting Judge of Pūna, who, by applying the rule of *dāmdupat*, reduced a claim founded on two mortgages executed in 1844, and by which it was expressly agreed that the rule of *dāmdupat* should not apply, from Rs. 25,000 to Rs. 5,848-5-6. Mr. Gonne, in an able judgment, holding that it was not competent for Hindus, in dealing with each other in such a case as that before him, to exclude by compact the operation of that rule, and stating it to be his opinion that the cases alluded to in Section XII. of Reg. V. of 1827, as those to which the rule of *dāmdupat* would be inapplicable, must be cases of running account, and not mere debts on mortgage bonds, such as those before him.

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Special Appeal No. 825 of 1864 was decided by FORBES and WARDEN JJ. on the same principles.

Special Appeal No. 638 of 1866, in which COUCH, C.J., and NEWTON and WARDEN JJ., affirmed a decree of the Judge at Sātāra, was one of a running account. The mortgagee having been in possession on the ordinary terms of accountability for such rents and profits as he received or might with due diligence receive, the Judge held that in-

- (a) 1 Bom. H. C. Rep. 47. (b) 3 Bom. H. C. Rep. A. C. J. 23.
(c) *Ibid* 25. (d) 3 Beng. L. Rep. A. J. 130.
(e) 6 Mad. H. C. Rep. 400. (f) 7 Bom. H. C. Rep. A. C. J. 12.

1872. interest did not cease to run on the principal moneys under
 NA'RA'YAN Section XII. of Reg. V. of 1827.

^{v.}
 SATVA'JI. *Nathubhai v. Mulchand (g)*, decided in 1868 by Couch, C.J.,
 and NEWTON J., overruled the too broad proposition laid down
 in *Narayan v. Gangaram* (Special Appeal No. 384 of 1868),
 reported in the same Volume (p. A.C.J. 156) that the rule of
dāmdupat was not applicable to mortgages, and showed that
 it would be applicable, if there were only an account to be
 taken of principal and interest due on the mortgage, and no
 account of rents and profits on the other side. There was,
 however, in *Narayan v. Gangaram* a running account in re-
 spect of rent and profits.

In the present case by the mortgage bond of the 7th July
 1834 for Rs. 401 (exhibit No. 12), the produce of the land is
 definitively fixed at Rs. 35 per annum with which the mort-
 gagee was to be chargeable. That is deducted from the
 annual amount of interest at Rs. 1½ per mensem the
 stipulated rate, and the balance Rs. 49 is stated to be the sum
 to be annually paid in cash, and for which the mortgagors were,
 by the terms of the mortgage bond, to be personally liable.
 The legal result then of that arrangement is this, that the
 mortgagees were to hold the land without liability to account
 for rents and profits, and that, in consideration for that,
 they (the mortgagors) instead of being liable to pay Rs. 1½
 per mensem interest on Rs. 401, were to pay Rs. 49 per
 annum in full of interest on that principal. Therefore, even
 admitting the mortgagees, as they were, to have been in
 possession, there could not, in respect of that mortgage bond
 (exhibit No. 12), have been any account of rent and profits
 taken.

Here the case of *Vithal v. Daud (h)* is applicable. Couch,
 C.J., says (p. 94) : " But where the profits are by agreement
 to be received in lieu of a portion of the interest, no account
 can be taken of the profits, and the remaining portion of
 the interest must only be allowed for six years. The
 exhibit No. 6 provided that for a part of the debt no interest

(g) 5 Bom. H. C. Rep. A. C. J. 96.

(h) 6 Bom. H. C. Rep. A. C. J. 90.

should be charged, but that the profits should be enjoyed in lieu of interest. Where the Court does not order an account to be taken of the interest on the one side and of the rents and profits on the other, we have held that in cases to which Reg. V. of 1827 (Secs. 11 and 12) applies, that is, cases where the contracts were made before Act XXVIII. of 1855 came into operation, the arrears of interest must be limited to six years. The effect is that where an account is not ordered, the parties are put into the same position as if the suit was simply one to recover the principal money and interest." This is such a case, the mortgage bond (exhibit No. 12) having been executed in 1834. Inasmuch as the interest upon that bond, taken as fixed in it, at Rs. 49 per annum, would, for six years, amount to Rs. 294 (the special character of the arrangement had the effect of excluding compound interest), and accordingly be less than the principal, that amount of interest may be allowed to the mortgagees. Had the interest, so calculated, exceeded the principal, such excess could not be allowed, as the effect of the concluding portion of Section XII. of Reg. V. of 1827 would be to render the rule of *dāmdupat* applicable. It has been contended for the mortgagees that it would be very hard to apply the six years' rule in a case like the present, where the mortgage was for ten years, and the mortgagees could not file their plaint to foreclose until that time elapsed. There was not, however, anything to prevent them from suing the mortgagors personally for the interest which they had undertaken personally to pay; and, further, not only ten years, but thirty-eight years have elapsed since the date of the mortgage, and now at least the six years' rule would be applicable. The mortgagees, if such were their pleasure, might have taken proceedings to foreclose 28 years ago. It may here be observed that this is not a mortgage by way of conditional sale, although there is a sort of promise in it to convey to the mortgagees in default of due payment.

The rate of interest reserved by the Exhibits Nos. 7 and 8 (2 per cent. per mensem) is so high that six years' arrears of interest would in each case exceed the principal. The

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1872. rule of *dámdupat* must, therefore, be applied to those instruments.

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The account, therefore, will stand thus :—

	Principal.		Interest.		
First mortgage.	Rs. 401	+	294	=	695
Second do.	„ 425	+	425	=	850
Third do.	„ 240	+	240	=	480
Assessment (undisputed)	60				60
					<u>Rs. 2,085</u>

The decree of the Joint Judge, therefore, must be varied by directing that on payment to the defendants of Rs. 2,085 for principal and interest in *Chándvad* currency within six calender months from the 1st day of June, 1872, and the cost of the suit and Regular Appeal, the plaintiffs shall be at liberty to redeem the two fields Nos. 131 and 136 in the plaint mentioned : and, in default of payment of such principal, interest and costs within the said period of six calendar months, that the plaintiffs be for ever foreclosed from any right to redeem the said fields.

The defendants must pay to, the plaintiffs their costs of this appeal, the amount thereof to be allowed by way of set off, so far as it will go, against the principal, interest and costs above directed to be paid to the defendants. On such redemption, as aforesaid, the possession of the said fields to be made over to the plaintiffs.

[APPELLATE CIVIL JURISDICTION.]

1872.
May 1.*Special Appeal No. 514 of 1869.*NA'NA'BHA'I VALLABHDA'S *Appellant.*NA'THA'BHA'I HARIBHA'I *Respondent.**Special Appeal—Discovery of new matter—Review—New matter showing want of jurisdiction—Practice—Withdrawal of Special Appeal—Review by lower Court.*

As a general rule the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal.

Whether this is so when such new evidence might affect the jurisdiction of the Court which tried the case—*Qære.*

When new evidence is discovered, the proper course for the appellant to adopt is to ask leave to withdraw his special appeal, and to apply to the lower Court for a review of its judgment.

ON the 18th day of April 1871, MELVILL J., (being requested to admit a review of judgment passed in the above special appeal, on the ground that new evidence had been discovered since the special appeal had been decided,) referred the question involved in the application to a Full Bench, with the following remarks:—

It has been the practice in this Court to admit reviews of judgment passed in special appeal on the ground of the discovery of new evidence. Following the practice, I have myself admitted some reviews, though not without considerable doubts. These doubts have been increased by recent decisions of the Calcutta and Madras Courts (a), and I, therefore, think it advisable to refer, for a decision by the Full Bench, the question whether the discovery of new matter or evidence is a ground for the admission of a review of a judgment passed in special appeal.

The reference was argued before WESTROPP, C.J., and MELVILL and KEMBALL, JJ.

Chunilal Maniklal, for the appellant.

Dhirajlal Mathuradas, for the respondent.

Cur. adv. vult.

(a) 4 Beng. L. Rep. A. J. 213; 5 Mad. H. C. Rep. 464.

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WESTROPP, C.J.:—The Court, when sitting in special appeal, has not ordinarily any power to determine questions of fact. Were the Court, on review of its decree made in special appeal, to set aside that decree on the discovery of new evidence, it could not make use of that new evidence for the purpose of altering any of the findings on questions of fact by the District Court. Nor would the discovery of new evidence subsequently to the making of the decree of the District Court be any ground of special appeal, although it might be good ground for an application to the District Court for a review of its decree, provided no special appeal shall have been admitted by the High Court.

In the reasons assigned by the High Court of Madras, in *Jackammal v. Palneappa Chetty* (b), for its decision that there is not any power in the High Court to admit a review of judgment on the ground of the discovery of fresh evidence, we concur. Similar decisions have been made in Calcutta: *Panchanan Modkerjee v. Radha Nath Mookerjee* (c) *Bhyrob Nath Tocc v. Kally Chunder Chowdhry* (d).

Where the new evidence, on which the review is sought, is evidence of facts which might affect the jurisdiction of the Court in special appeal, such a case would be peculiar, and possibly might constitute an exception to the general rule which we have now laid down. Whether the Court ought, in such a case, to review its decision made in a special appeal, is a question on which we refrain at present from expressing an opinion.

Pleaders should be careful to advise their clients not to prefer special appeals where the proper remedy is an application to the District Court for a review of judgment.

In *Pándurang Sadáshiv v. Moro Vásudev* (e) it appears to have been said that where an appellant discovers fresh evidence after a special appeal has been admitted, the proper course for him to pursue is to ask to have the special appeal dismissed and to apply to the lower Court for a

(b) 5 Mad. H. C. Rep. 404. (c) 4 Beng. L. R. 213 A. C. J.
 (d) 16 Calc. W. Rep. Civ. R. 112. (e) 6 Bom. II, C, Rep. A.C.J. 63.

review. But since that case was decided, this Court has adopted, in several instances, what seems to be a better and more logical course, namely, to permit a special appellant to withdraw his special appeal, and thus to treat it as having never been admitted, in order to allow him to apply to the District Court to review its judgment, in cases where that was the only means, available for the appellant, of obtaining a revision of the District Court's findings upon the facts, and where, otherwise, injustice would be done. Lately, in the case of *Dullabh Shirlal v. Hope (f)* (Special Appeal No. 612 of 1870), decided, November, 9th 1871, where we considered the decree of the District Court to be erroneous in law, but the sum claimed in the suit being under Rs. 500, and, therefore, by Section 27 of Act XXIII. of 1861, not the proper subject of a special appeal, the plaintiff was permitted to withdraw his appeal, which then was to be regarded as having never been admitted, and he was left free to apply under Section 376 of the Civil Procedure Code to the District Judge for a review of his decree. On granting the permission to withdraw the special appeal, the Court might direct that the order, by which the special appeal had been admitted, should be cancelled.

We think that the question submitted to us, whether the High Court has power to grant a review of its decree on the ground of a discovery of fresh evidence, ought to be answered in the negative. We reserve our opinion, however, as to the existence of such a power where the new evidence might affect the jurisdiction of the Court.

(f) 8 Bom. H. C. Rep. A. C. J. 213.

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P.
NA'THA'-
BHA'I
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Handwritten signature/initials

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[APPELLATE CIVIL JURISDICTION.]

ILR 2 Bom 265.

Special Appeal No. 42 of 1870.

KA'LU bin VISA'JIAppellant.

DA'MODHAR GOVINDRespondent.

Execution—Sale in Execution of decree—Property wrongfully sold—Refund of purchase money by execution creditor—Execution creditor liable in damages to true owner for wrongful sale—Civ. Pro. Code.

Secs. 256—258.

Notwithstanding the *dicta* in the case of the *Bank of Hindustan v. Premchand Raichand (a)*, it must now be considered as settled law that a purchaser at a Court's sale (except in cases in which such sale is set aside for irregularity under Section 257 of the Code of Civil Procedure) is not entitled to a refund of his purchase money from the execution creditor in cases in which it turns out that the judgment debtor had no right, title or interest in the property sold as his.

Cases which decide that a person whose property has been wrongfully seized by the Court, or wrongfully seized and sold at a Court's sale, as that of the judgment debtor, is entitled to recover damages from the execution creditor, at whose instigation the property has been so seized or so seized and sold, reviewed.

THIS was a special appeal from the decision of R. F. Mac-tier, District Judge of Sátára, in Appeal No. 260 of 1865, affirming the decree of Krishnaráv Vithál Vinchurkar, First Class Subordinate Judge in that district.

Kálu bin Visáji, who had obtained a decree against one Ganesh Gopál, attached and sold in execution of his decree five out of seven *khans* (compartments) of a house, as the property of his judgment debtor. Hiráchand purchased the five *khans* at the Court's sale, and the same were by the Court given into his possession. Dámodhar Govind then brought a suit against Kálu and Hiráchand to recover possession of 2½ of these 5 *khans*, so purchased by Hiráchand, alleging that he (Dámodhar) had been a joint owner of the property with Ganesh Gopál. The plaint did not contain an express claim for damages against either of the defendants. The Subordinate Judge, at first, threw out the plaintiff's claim, considering that he had failed to prove his title. On appeal, the District Judge reversed that decree, and remanded the

(a) 5 Bom. H. C. Rep. O.C.J. 83, 92 and 93.

case for the Court of first instance to try whether the whole house or only a part of it had belonged to Kálu's judgment debtor, Ganesh Gopál. The Court on remand found that Dámodhar was entitled to the $2\frac{1}{2}$ *khans* as claimed by him, and gave Dámodhar a decree for Rs. 195, being half of the amount for which the said five *khans* had been sold. The decree was given against Kálu, but the suit against Hirá-chand was dismissed. On appeal, the District Court confirmed the decree passed by the Subordinate Judge.

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The District Judge, after raising the issue whether a decree had properly been given against Kálu, said :—" In the former minute in this case, I was of opinion that Kálu, who caused all the property to be sold as his debtor's, was liable for so doing, and I am still of the same opinion. I am now referred to Special Appeal No. 46 of 1867, as an authority for holding that the purchaser at the sale took on himself any risk as to the title of the judgment debtor, and that if a man bought property at auction as that of a certain person, he had no remedy against the execution creditor, if it turned out that the property sold and bought was *not* the debtor's. But this is not the point here. The person who purchased the property is not here the plaintiff, seeking for compensation for loss on account of wrongful representation as to the ownership of the property sold, but the person whose property was sold under a false intimation that it was the property of a judgment debtor. In the judgment of the High Court in this case, No. 46 of 1867 (High Court Reports, Vol. IV page 118), Mr. Justice Tucker says : ' It has been held in Special Appeal No. 417 of 1861, and cases 2 and 3 of 1866, that a person, whose property has been wrongfully sold in execution of a decree passed against some other person, can recover damages against the execution creditor for any loss which he may have suffered in consequence of the act of the latter in attaching and selling property which did not belong to his judgment debtor, and, I think, there can be no question of the soundness of these decisions.' The present case is just such a one as that set up in these remarks of Mr. Justice

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Tucker. Kálu sold the property as Ganesh's which, in reality, was Dámodhar's, and of course, Dámodhar can claim damages from Kálu for putting up for sale what was not his debtor's. * * * The attachment by Kálu was most reckless and he should be made responsible. The cost of the half house sold has been fixed by the Subordinate Judge as Rs. 195, or half the sum realized at auction for the whole house. This award under the circumstances seems fair and its amount is not objected to. So on the whole question, I must decide to confirm the decree of the Subordinate Judge with all costs."

The appeal was argued before Westropp, C.J., and West, J., on the 18th August 1871.

Bhairavnáth Mangesh for the appellant.

Shántarám Náráyan, contra.

Cur. adr. vult.

WESTROPP, C.J.:—This suit, filed in 1863 in the Court of first instance by the plaintiff, Dámodhar Govindbhaṭ, and in which there have been two appeals to the District Judge, comes before this Court on special appeal under unsatisfactory circumstances. The plaint expressly seeks to recover a house alleged to have consisted originally of seven *khans*, or more properly to recover the plaintiff's share in it. Of that house, he avers five *khans* to have been sold at the instance of the first defendant, Kálu Visáji, in a suit brought by him against his debtor, Ganesh Gopál, who had only a limited interest therein (not exceeding apparently one third, whereas upwards of two thirds had, under the sale in Kálu's suit, passed into the possession of the second defendant, Hiráchand, who became the purchaser at that sale). Both of the lower Courts considered the plaintiff to have established his title as a joint owner of the house. And on the second trial the Principal Šadr Amín made a decree against Hiráchand, the purchaser, but in favour of Kálu Visáji, the execution creditor.

The District Judge, being of opinion that Hiráchand was not liable to this suit, and that Kálu was liable, remanded the

cause in 1868 a second time for retrial. So far as regards Hiráchand, if he were in possession of the premises at the time of filing this suit, the ruling of the District Judge was erroneous. As owner of a share in the house, the plaintiff was certainly entitled to pursue it into the hands of a purchaser albeit for valuable consideration, and if Hari Ghátak, *after the institution of this suit*, purchased and took over the house from Hiráchand, his (Hari Ghátak's) claim to possession was not entitled to be treated with any ceremony: Sec. 223, Civil Procedure Code. The decree which bound Hiráchand would bind him also: *Trye v. Earl of Aldborough* (b).

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It may be that if the plaintiff had obtained a decree (as he ought to have, if Hiráchand had not parted with his interest before the commencement of this suit) against Hiráchand, and recovered the share in the house to which he (the plaintiff) was entitled, he might also have recovered damages against Kálu in respect of any detriment occasioned to the house by the attachment and sale thereof. As to this point, however, I do not purpose, on the present occasion, to give any positive opinion.

If Hiráchand, or Hari Ghátak, had pulled down the house (as has been alleged of the latter), either of them, so acting, would have rendered himself subject to an action for damages, which, in England, would be in form an action of trespass.

On the retrial which took place after the second remand, the Subordinate Judge found that the plaintiff was owner of one half of the house of which the whole had been sold, (by this I understand that he found the plaintiff to be owner of $2\frac{1}{2}$ of the five *khans* sold as the property of Ganesh Gopál). He valued the plaintiff's share at Rs. 195, and made a decree for that amount with costs against Kálu Visáji, and dismissed the suit as against Hiráchand with costs as against the plaintiff.

In so doing, the Subordinate Judge acted in conformity with the opinion of the District Judge, but erroneously, so far at least as regarded Hiráchand.

(b) 1 Irish Chan. Rep. 666.

1872. The plaintiff, being probably satisfied with a decree against
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 r.
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 GOVIND. Kálu Visáji, has not appealed against the dismissal of suit
 so far as it concerned Hiráchand.

Kálu alone appealed against the decree to the District Judge, who affirmed it with costs, referring to a passage in the judgment of Tucker J., in *Dhondu v. Rámji* (c).

Kálu has specially appealed to this Court. The special appeal was heard by West J. and myself. Before judgment could be given, my learned colleague had retired from the Bench. I regret extremely that I have not now his able assistance in disposing of the case.

As to the first and second objections made by the defendant, Kálu, to the decree, it is to be observed that he did not make either of those objections (although the ground for them both then existed) in his appeal to the District Judge; they also are formal objections which, having been once passed over by the appellant, the Court now declines to entertain. Moreover as to the first of them, although it is the fact that the plaintiff did not, *in totidem verbis*, ask by his plaint for damages against Kálu, in the event of the plaintiff's failing as against Hiráchand, or of his recovering the mortgaged premises from Hiráchand in an injured state, and so being entitled to proceed against Kálu in respect of that injury, yet it is difficult to say for what purpose he made Kálu a party, defendant, to the suit, if it were not to make him responsible for damages. He was not holding the land nor claiming any interest in it; there, therefore, was not any necessity for making him a party in order to recover the land itself.

The remaining points amount to this, that an action will not lie against an execution creditor, when property not that of the judgment debtor has been seized or sold in execution of the decree against the latter—a point of some nicety, and as to which a good deal may be said on both sides.

Notwithstanding what is said in 5 Bom. H. C. Rep. O. C. J., 83, 92, 96, as to the propriety of making the execu-

(c) 4 Bom. H. C. Rep. A.C.J. 118.

tion creditor a party to a suit brought by the owner against the purchaser of property at a judicial sale, and as to the scope of Sec. 258 of the Civil Procedure Code, it must now be considered as settled that, except where the sale has been set aside for irregularity under Sec. 257, the purchaser would not be entitled to a refund of his purchase money, although it might turn out that the judgment debtor had no right, title or interest in the property, and consequently that the purchaser had not taken anything by his purchase: *Dhondu v. Rámji* (d); *Krishná pá v. Panchá pá* (e); *Sowdamini v. Krishna* (f); *Sheikh Mahomed v. Sheikh Abdulla* (g); *Mohanund v. Akial Mehaldar* (h). Those decisions rest upon the rule *caveat emptor*.

It does not, however, thence follow that a person whose property has been wrongfully seized and sold, or seized alone, has not a remedy against the execution creditor, who put the Court and its process in motion to effect such seizure or sale. In England and in the Island of Bombay, no doubt the usual course is for the injured person to sue the Sheriff, but in the Mofussil I have never heard of such a suit being brought against the Názir or other Court officer. There are two unreported cases in this Court, Special Appeal No. 417 of 1861, *Gosáí Náná v. Lálbhái Náranji*, decided by Hebbert and Newton JJ. in 1863, and Special Appeal No. 3 of 1866, *Káshináth Ballál v. Jetu bin Kálu*, decided by TUCKER and GIBBS, JJ., in 1866, in which the execution creditors were held liable.* There are some cases unfavourable to the liability of the execution creditor:—*Rajbullub Gope v. Issan Chunder Hujrah* (i) [see also *Walker v. Olding* (j); *Woollen v. Wright* (k); *Cranshaw v. Chapman* (l); *Wilson v. Tumman* (m);] *Jan-*

* [Note.—A later decision to the same effect is that in *Dámódhar Tul-járám v. Lallá Khusáldás* 8 Bom. H. C. Rep. A. C. J. 177.—Ed.]

(d) 4 Bom. H. C. Rep. A. C. J. 114. (e) 6 *Ibid* 258, 262.

(f) 4 Beng. L. R. F. B., 11. (g) *Ibid* Appx. 35.

(h) 9 Calc. W. Rep. Civ. R. 118. (i) 7 Calc. W. Rep. Civ. R. 355.

(j) 1 H. & C. 621, S. C. 32 L.J. Exch. 142.

(k) 1 H. & C. 554 S.C. 31 L.J. Exch. 513.

(l) 10 W. Rep. 323 Exch. (m) 6 M. & Gr. 236.

1872. *nanddin v. Nyanatalla (n)*. But it has twice lately been held in Calcutta that an action will lie against the execution creditor: *Mt. Subjan Bibi v. Sheikh Sariatulla (o)* by NORMAN and E. JACKSON JJ., and *Kanui Prasad Bose v. Hirachand Manu (p)*. I am not prepared to say that those cases have been wrongly decided, although it is true that all that is sold is the right, title and interest of the judgment debtor, and, even if I had some misgivings with respect to them, I should hesitate, when sitting alone, to overrule those decisions. They derive much support from *Jarmain v. Hooper (q)*. I may also mention *Walley v. McConnell (r)* as involving the same principle, and *Humphrys v. Pratt (s)* where a Sheriff, upon the representation of the plaintiff in a suit, having seized goods under a *fiere facia* as belonging to the defendant, and damages having been recovered against the Sheriff by a third person claiming the goods, it was held that an action lies at the suit of the Sheriff for a false representation. In *Mohundass v. Gokuldass (t)* the execution creditor was held liable, but the process sued out by him was irregular.

The decree of the District Judge must be affirmed with costs.

(n) 5 Beng. L. Rep. Appx. p. 73, *in notis*.

(o) 3 Beng. L. Rep. A.J. 413. (p) 5 Beng. L. Rep. Appx. 71.

(q) 6 M. & Gr. 827. (r) 13 Q. B. 903.

(s) 5 Bligh N.S. 154. (t) 9 Calc. W. Rep. P.C. 91.

[APPELLATE CIVIL JURISDICTION.]

1872.
May 23.

Special Appeal No. 238 of 1871.

BALVANTRÁV alias TA'TIA'JI BA'PA'JIAppellant.

PURSHOTAM SIDHESHVAR and anotherRespondents.

Hindu Law—Hereditary Office, fees of—Immoveable property—Limitation—Act XIV. of 1859 Sec. I. cl. 12 and 16.

The cl. of the Limitation Act (No. XIV. of 1859) which is applicable to a suit to recover fees payable to the incumbent of an hereditary office such as that of a village Joshi is cl. 12, and not cl. 16, of Sect. I. of that Act.

Kri.hnabhat v. Kapdhat (a) followed.

The meaning of the term immoveable property as used with regard to Hindu law, discussed.

THIS was a special appeal from the decision of M. B. Baker, Assistant Judge at Púna, in Appeal No. 116 of 1869, confirming the decree of the Subordinate Judge of Khed.

Purshotam and his brother Moro sued to recover from Balvantráv and another the amount of fees due to the holder of the hereditary office of a village Joshi for five years, from 1863-64 to 1867-68. The defendants, among other things, pleaded the law of limitation, and stated that the fees in question had not been received for ten years previous to the date of suit. The Subordinate Judge awarded the plaintiff's claim, and in appeal, his decree was confirmed on the 9th January 1871.

The appeal was argued before Gibbs and West, JJ., on the 31st August, 1871.

Dhirajlál Mathurádás for the appellant.

Shámráv Vithal, for the respondents.

The question argued was "whether Section I clause 12, or Section I clause 16, of the Limitation Act (No. XIV. of 1859) is applicable to a suit to recover fees payable to the incumbent of the hereditary office of village Joshi." On the 11th November 1871, the Court determined to refer the question to the Full Bench under the following minutes:—

*Approved
by R.C.
M.A. 10
p. 281*



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WEST J. :—In this case the one party relies on the ruling at Bombay H. C. Reports VI. A. C. J. 56 and the other on that at page 137 of the same volume. The two rulings do not appear to me to be reconcilable in principle. Down to the time of the latter of them, it would seem that immovable property under the present Limitation Act was, in general, held to be substantially defined as “land or an interest in land.” In the case at Bombay Report I. A. C. J. 186 *haks* payable out of land were, on that express ground, held to be subject to the 12 years’ limitation as immovable property, but where they could not be clearly made out to be a charge on land, in the case at Bombay Reports IV. A. C. J. 189, it was held that the 6 years’ rule applied. In the earlier of the cases cited from the 6th volume (*Ráiji Manor v. Kallíánrái Hukamatrái*), which was one of a claim to *destígiri haks*, our late learned Chief Justice says : “The first question is whether the money claimed is an interest in land”—and immediately afterwards, “The present *hak*, therefore, not being an interest in immovable property, Clause 16, and not Clause 12, of Section I of the Limitation Act applies to it” thus identifying “an interest in land” and immovable property. In this judgment my learned brother Gibbs concurred. Following the analogy of the late Sudder Court’s decisions under the old law of limitation, he says : “In the present case 6 years’ arrears could have been recovered, so the period for title should be the same.” In the second case, however, that of *Krishnabhat v. Kapábhat*, the same learned Judges adopted a different test of immovable property. The Chief Justice says : “I agree with the District Judge that the hereditary nature of the estate does not of itself make the office immovable property and affect the term of limitation” adjudged by the District Court to be 6 years. “But,” he continues, “in the absence of any interpretation clause, such as there is in the Indian Succession Act 1865, I think we ought, in applying the law of limitation between Hindus, to include in the term immovable property whatever is in the Hindu Law understood to be such.” After some further discussion the learned Judge concludes : “Although there-

fore the office of a priest in a temple, when it is not annexed to the ownership of any land or held by virtue of such ownership, may not in the ordinary sense of the term, be immoveable property, but is an incorporeal hereditament of a personal nature, yet being by the custom of Hindus classed with immoveable property, and so regarded in their law, I think in a suit between them, it should be held to be within clause 12 of Section I of Act XIV. of 1859, by analogy to the rule that what are to be deemed immoveables is determined by the *lex rei sitae*." Mr. J. Gibbs in the same case says "when we look into the Hindu Law, we find no division of property into moveable and immoveable, but those terms have been used by English writers thereon for convenience in describing certain descriptions of property," then he shows that "Nibandha" means "'fixed property' that is *Sthávāra* or immoveable" and finally as Nibandha includes "fees or perquisites due under a permanent title;" he concludes that property of this kind ranks as "analogous to real property," and is, therefore, to be considered immoveable property for the purposes of the Limitation Act.

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If we adopt the criterion here set up, it seems to me impossible to support the decisions in the previous reported cases. Instead (at page 58 of Vol. VI.) of "the first question is whether the money claimed is an interest in land" should have been said "the question is whether this money ranks according to Hindu Law as "Nibandha." The answer would have been "it does," and the decision the reverse of the one actually arrived at. So also as to the two earlier cases, it is quite clear that in both the money claimed was, if due at all, "due under a permanent title" and, therefore, subject to the 12 years' rule, whether it were an interest in, or charge on, land or not.

But the method of interpretation adopted in *Krishnabhat v. Kapábhat* appears to me one that may admit of reconsideration. The Limitation Act having been drawn up in the English language by a legislative body of Englishmen, its terms ought apparently to be construed according to the

1872. ordinary usage of the language. To say that because
BALVANT- 'Nibandha' property "classes" for some purposes "with
RA'V immoveables" and because it includes a grant of "Sthávāra"
T. BA'PA'JI i.e. immoveable property, therefore the English word 'im-
PURSHOTAM moveable' used in an English law is to receive its meaning
SIDHE- from 'Nibandha' does not seem a strictly legitimate process
SHVAR. of reasoning. (By a similar process applied to the words
Lord Chancellor, translating them into Latin as *praetor*, and
then taking the latter to determine the meaning of the
former, we might arrive at the conclusion that a Chancery
Judge is a Military Commander.) The converse error of
translating a vernacular word into some partial equivalent
in English, and then treating the two as identical is notably
common. Both should be avoided as far as possible. Pro-
perty, as Sir R. Couch admitted, may be hereditary without
necessarily being immoveable, therefore, the classing of
"Vritti" or "Nibandha" with hereditary property does not
seem properly to affect the question. If immoveable pro-
perty, as is said by Mr. Justice Gibbs, includes "Chattels,"
as "dravya" is translated, all distinction between moveable
and immoveable property is lost. But here again the two
terms are not really equivalent; and it would not be fair to
found on their equivalence an argument to show that the
distinction, immediately afterwards drawn by my learned
brother between moveable and immoveable property, is
unsustainable. What really strikes one, is the contradictions
that must arise from taking the words of an Act in varying
senses according to the different meanings of the partial
equivalents used by people speaking other languages. If
the word "immoveable" is to be construed differently ac-
cording to the class of people to whom the law is applied,
so also should the words "month" and "year." We
might then not only have property changing its charac-
ter according to the hands it came into or the claimant who
sought it, but a Muhammadan endorser of a bill of exchange
sued by the English endorsee, after his own remedy against
a prior Muhammadan endorser had become barred by limita-
tion. The intention of the legislature is the thing to be
ascertained, and there is, I think, no indication that it

intended the terms of the Limitation Act to operate differently according to the races to whose actions it was to apply.

Sir R. Couch thought that his judgment was supported by "analogy to the rule that what are to be deemed immoveables is determined by the *lex rei sitae*." To me, I must confess, the analogy points the other way. The *lex rei sitae* impresses on property a particular character for jural purposes determined for all by a uniform rule, as distinguished from the various personal circumstances which make moveable property subject to different laws. If personal characteristics are thus to determine the nature of the property, we may, using the language of Von Savigny (Section 366), enquire, "But what person is thereby meant? Without doubt, the person interested in the legal relation to this thing. But this is a very ambiguous notion; and thereby the whole doctrine, even if it were admitted, becomes extremely indeterminate and uncertain. By the party interested we may understand the owner; but then it remains doubtful whether, in a transfer of property, the old or the new owner is meant. So, too, in a dispute as to property, which of the two competing parties, each of whom claims for himself the property. But we may also entirely give up thinking of the owner, and take the possessor as the party interested, by which, certainly, the matter is made simpler and easier. Besides property, various other real rights come under consideration; and each of these, when it exists, or is even asserted, leads back to a new person interested in the thing."

There is, it seems to me, but one way out of these difficulties, the simple one of construing the words of the English law in a strictly English sense. The distinction of immoveable and moveable property is of course not one that would be adopted if the English division into real and personal were meant. It is drawn rather from the Civil Law. But still a definite sense can be given to the term 'immoveable' from its use, and that of the word 'moveable', in the Acts of the Indian Legislature; and this being ascertained, it should not, I think, be subject to fluctuations depending on the race, caste, or religion of those who have to do with the property.

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I would, therefore, refer the question of limitation in this case to a Full Court.

Gibbs J.:—I am still of opinion that the decision in the case of *Krishnabhat v. Kapābhat* (b), in which Sir R. Couch sat with me, is correct, but as the question is one of considerable importance, I do not object to have it referred to a Full Court.

Accordingly on the 5th February 1872, the reference was argued before a Full Bench consisting of WESTROPP, C.J., GIBBS, LLOYD, MELVILL, and KEMBALL JJ.

Dhirajlāl Mathurādās, for the appellant:—The suit is not for the recovery of immoveable property, but for the recovery of dues payable to an hereditary village Joshi. It ought, therefore, to have been brought within six years under Clause 16 Section I of Act XIV. of 1859. The plaint was not filed till the 21st January 1869. The last payment on account of the office was made in 1860, as found by the lower Court. Since then no payment has been made. The suit, therefore, is clearly barred. The right of an hereditary Joshi to receive certain fees is not of the nature of immoveable property. The words "immoveable property" must be taken in their plain and natural sense as commonly understood in the English language. Act XIV. of 1859 was framed by English lawyers and English legislators and, therefore, their meaning of the words "immoveable property" ought to be taken. Those words are not to be interpreted according to Hindu law or according to the religious usages of the parties. According to Hindu law, mesne profits come under immoveable property. But a claim for them between Hindus is not governed by Cl. 12 Section I. Our salaries also answer the description of "Nibandha," and would, therefore, fall under the denomination of immoveable property. He cited Special Appeal No. 4277 (FORBES and TUCKER JJ.) decided on the 23rd March 1865; Special Appeal No. 399 of 1866 (COUCH, C.J., NEWTON and WARDEN,

JJ.) decided on the 17th December 1866; *Mahārānā Fate-sanaji v. Desai Kalyānrāya* (c).

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Shāmrāv Vithal, contra:—The parties to the suit are Hindus, and the suit relates to the Watan of a village Joshi. Whether the property in dispute is immoveable, or moveable, as regards limitation is to be determined, not by considering what is ordinarily meant by those words in the English language, but by a reference to what the law of the parties hold such property to be. The law of limitation is simply intended to prescribe some period within which people are to enforce their right, and not to change the nature of property. Regulation V. of 1827, Sec. I classes hereditary offices as immoveable property. The new Limitation Act (No. IX. of 1871, second schedule, Art 123) allows twelve years for a suit for the possession for hereditary office. He cited Mayne on Ancient Law, pages 273-74; 8 Moo, Ind. App. pages 242-50; Burgess's Common Colonial and Foreign Law, vol 2, page 86; Story on the Conflict of Laws, Section 576, Page 766. 6th edn.

Cur. adv. vult,

WESTROPP, C.J. :—The question referred to the Full Bench by a Division Court, consisting of GIBBS and WEST, JJ., is whether Section 1, clause 12, or Section 1, clause 16, of the Limitation Act XIV. of 1859 is applicable to a suit to recover fees payable to the incumbent of the hereditary office of village Joshi, *i.e.*, whether the measure of limitation prescribed in such a case is twelve or six years.

Section 1, clause 12 is: "To suits for the recovery of immoveable property, or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose." The question, therefore, becomes simply whether the fees of an hereditary office constitute "an interest in immoveable property" within the meaning of that section.

The Limitation Act XIV. of 1859 does not itself contain any definition or description of immoveable property.

(c) 4 Bom. H. C. Rep. A. C. J. 189,

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Subsequent Acts have been referred to as containing definitions of immoveable property; amongst them the Indian Succession Act X. of 1865, as follows:—" 'Immoveable property' *includes* land, incorporeal tenements, and things attached to the earth, or permanently fastened to any thing which is attached to the earth." But that is in truth no definition, as the use of the word "includes" shows. It is not by any means intended to be exhaustive. The explanation of the word "person" in the glossarial part of the same Act shows this. It is as follows:—" 'Person' *includes* any Company or Association or body of persons, whether incorporated or not." No one could contend that the word "person," as used in that Act, does not also include an individual, and yet the glossary does not assert that it does. When the Legislature intends to speak exhaustively it uses the word "mean" or "means" ex. gr. " 'year' and 'month' respectively *mean* a year and month reckoned according to the British Calendar," and again in the same Act " 'Moveable property' *means* property of every description except immoveable property." It was argued for the defendant that the express user of the term "incorporeal tenement" in the Indian Succession Act showed that the Legislature would have mentioned incorporeal tenements or hereditaments in the Limitation Act, if it had intended that the same should be included amongst immoveable property; but we do not think that such an argument is sustainable. Before stating the reason for that opinion, it may be well to mention the Registration Act XX. of 1866 which, in Section 2, says, that " 'Immoveable property' *includes* land, buildings, rights to ways, lights, fisheries, or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops nor grass," and the General Clauses Act (I of 1868), which, however, applies only to Acts passed subsequently to its coming into operation, enacts that "unless there be something repugnant in the subject or context" of such Acts " 'immoveable property' shall *include* land, benefits to arise out of land, and things attached to the earth" and that

"'moveable property' shall mean property of every description except immoveable property," which really amounts to no definition whatever, as the Act has not defined what immoveable property is, but has simply stated that the term "immoveable property" shall "include" certain specified property, but by no means indicates that it may not also include other property, which had, theretofore, passed under the denomination of immoveable property. The same remark applies to the Registration Act XX. of 1866 above referred to, in which also the inconclusive verb "includes" is used with regard to immoveable property.

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Instead of looking to subsequent legislation for the true interpretation of the phrase "immoveable property" as employed in the Limitation Act XIV. of 1859, which itself throws no light on that question, we should consider what was understood by that phrase previously to the passing of that Act.

Colebrooke, in 2 Strange H. L. 363, states that if an office be hereditary, the dues belonging to it are partible. "But in such case it classes with immoveables and corodies, and the dues belonging to it cannot be reckoned household property." Mr. Ellis says that the official perquisites cannot "be accounted as household property." He adds: "For what is the real nature of them? Are they not given for the subsistence of the officer, enabling him to apply his whole time and attention to the accounts of the village; and would not the division of them among a number, for whose maintenance they cannot adequately provide, destroy their object? Again, does not the law that regards the grant of a corody apply to these and similar perquisites, and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention under which they are granted? I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible; nor ought they to descend by primogeniture. The most capable of the direct, or in their default, of the collateral descendants of the first grantee, should be selected for the performance of the duties of the office, who should enjoy the whole perquisites." We then have Mr. Colebrooke

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and Mr. Ellis, although differing as to the partibility of the emoluments of an hereditary office, concurring as to their being not household but immoveable property and in the same category with corodies. Sir Thomas Strange also (Vol. I. H. L. pp. 209, 210) classes the dues of an hereditary office with corodies. Speaking of the classification of the property of Hindus (*Ibid* p. 16) he says: "As with us also, property is further distinguishable into *real* and *personal*, *moveable* and *immoveable*; real or immoveable property, among the Hindus, including, besides land and houses, *slaves* attached to the land and annuities secured upon it, the latter bearing a close resemblance to that species of incorporeal hereditament which we call corodies." The first edition of his work was published in 1825.

The first edition of Colebrooke's translation of Jagannáth Tercapanchana's Digest was published in 1801. At Vol. II. page 162, placitum XXXIV., is the following passage:—

"Yájnyawalkya:—Let a king having given land or assigned a corody, cause his gift to be written for the information of good princes who will succeed him, 2. Either on prepared silk, or on a plate of copper, sealed above with his own signet. Having described his ancestors and himself, 3. The quantity of the gift, with the penalty of resumption, and set his own hand to it, and specified the time, let him render his donation firm." (*d*). Thus we see that Yájnyawalkya classes together land and a corody, and directs that the donation of either should be "firm." The commentator on pl. XXXV. says (*Ibid* p. 163): "In the Dipacalíá, a corody is thus explained: the gift of a future thing by a previous agreement in this form 'I will give a hundred *suvernas* every month of cártici' or 'out of this mine, or this village, I will annually give a hundred *suvernas*' or 'I will monthly give one *suverna*.'" The property over which the father has full dominion is mentioned in Vol. III, at page 31 pl. xc, xci; and next at page 34 the property over which his sons have equal dominion with him. Plac. xcii. is: "Yájnyawalkya:—
"Over land acquired by the grandfather, over a corody out of

(*d*) Vide *Ibid* p. 167.

mines or the like, settled on him and his heirs by the king, and over slaves employed in his husbandry, (or over gold and the like, for the word 'dravya' is expounded variously,) the father and the son, when the grandfather dies, have equal dominion;" and the Commentator says: "'A corody,' a fixed pension receivable out of mines or the like, and settled on him and his heirs by the King or other benefactor." Plac. XCIII is: "Brhaspati:—Of property acquired by the grandfather, whether moveable or immoveable, equal shares are ordained for the father and the son." "The Commentator considers 'moveable' as here signifying anything not immoveable, as gold or the like. In expounding the text of Yājñavalkya (XCII) the Retnācāra has this gloss: 'that which is fixed or made fast (*nibadhayati*), is a corody (*nibandha*), or fixed pension receivable out of mines or the like. 'Equal Dominion': in this case no greater share is allotted to one than to another; nor can the father give away such property at his pleasure." Here again we have in these placita XCII and XCIII and in the commentary corodies classed with land. With regard to the word "dravya" as occurring in pl. XCII the better opinion seems to be that it is there employed simply to mean "slaves". It is so expounded in Raghunandana's treatise entitled *Dāyatatva: Dāya Bhāṅg*, clause II, pl. 9, n. 9 by Colebrooke; and the same exposition is given by Chudāmaṇi and A'chynta: *Ibid* pl. 13, 14 and n. 14 by Colebrooke, and pl. 25. The word "dravya" should, therefore, it seems, be there understood, as when used in composition thus "sthira-dravya," or (when abridged) "sthāvara," which indicates fixed or immoveable property: see Wilson's Glossary p. 149, 490. Slaves attached to the land, as we have seen, are immoveable property: 1 Strange H. L., 16. Devānda Bhatta in the *Smṛiti Chandrikā*, chapter VIII., referring to the same placitum from Yājñavalkya, says (para. 18): "A corody (*Nibandha*) signifies a permanent allowance received from saleable articles in virtue of an agreement or promise." The translator (Krishnasvāmi Iyer) has in the note to that passage at p. 98 (2nd edn.) collected six descriptions of the term corody (*Nibandha*). Of these we have already men-

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tioned three. The others are: "Anything which has been promised, deliverable annually or monthly or at any other fixed periods." Srikrishna; "So many leaves receiveable from a plantation of betel, pepper, or so many nuts from an orchard of areca": Mitak., ch. 1, Section V, pl. 4. The Sanskrit term Nibandha is by Wilson in his Glossary, p. 375, described thus: "In law, fixed or immoveable property; also a corody or fixed allowance granted by the Raja or person in authority, to be received from the proceeds of a manufactory, mine or estate."

Now certain it is that whether rightly, or wrongly, whether too indiscriminately, or otherwise, the writers, upon whom the framers of the Elphinstone Code for Bombay were almost wholly dependent for their knowledge of Hindu law, namely, Colebrooke and Strange, treated hereditary offices, corodies, land, and slaves attached to it, as in the same class, namely, immoveable property.

Accordingly we find that in Regulation V of 1827 (which down to the passing of Act XIV. of 1859, constituted the law of limitation for the Mofussil of this Presidency) hereditary offices are most distinctly recognized as immoveable property. Section 1, cl. 1 of that Regulation is as follows:—
"Whenever lands, houses, *hereditary offices or other immoveable property*, have been held without interruption for a longer period than thirty years whether by any person, as proprietor, or by him and his heirs, or others, deriving right from him, such possession shall be received as proof of a sufficient right of property in the same." Sec. 2 admitted the bringing of a suit within sixty years, if the possession exceeding thirty years had been obtained by fraudulent means.

Although corodies are not specified in that Regulation, the words "other immoveable property" are quite sufficient to include them, if they then did properly rank as immoveable property, and that they did so, the high authorities to which we have referred would seem to establish.

There is no more settled or safe rule of construction of enactments than that they are to be construed in reference

to the principles of the common law. It is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The Courts infer that the Act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the Legislature had that design, it is naturally said, they would have expressed it.

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Act XIV. of 1859, which is intituled "an Act to provide for the limitation of suits" recites that "it is expedient to amend and consolidate the laws relating to the limitation of suits," and does not afford, so far as we can discover, the slightest intention of altering the nature of property, i.e., of removing that which had theretofore been deemed immoveable property to the rank of moveable property, or *vice versa*. To have done so would apparently have been quite beyond the object of the Act, namely, the prevention of the bringing of stale claims into Courts of Justice, and might have affected many persons injuriously. For, although, the distinction between moveable and immoveable property amongst Hindus (who constitute the great majority of the population of India) is not nearly so great as that between real and personal property in England, yet there is for many purposes a distinction. The power of a Hindu to deal with moveables is greater than his power over immoveables; and if that which has been immoveable be transferred to the rank of moveable, his heirs are exposed to greater risk: *Dāya Bhāga*, ch. II, pl. 22, 23; II. *Colebrooke Dig.* p. 113, pl. XIII, p. 131, pl. XVIII, p. 157, 159; III. *Ibid* 36, pl. XCV; 1 *Strange H. L.* 17, 20, 21. The widow in this Presidency takes a limited estate only in the immoveable property of her childless husband, or son, but she takes his moveable estate absolutely: 1 *Bom. H. C. Rep.* 56, 117, 130; 2 *Ibid* 323; 2 *Strange H. L.* 13.

It must also be remembered that Limitation Acts are in abridgment of the common law right to sue, which is unlimited as to time, and those Acts being thus restrictive, should receive a strict construction, as Lord Nottingham C.

1873. said in a case upon the then recently passed Statute of
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 RA'V themselves to be restrained by exposition:" *Ash v. Abdy* (e)
 T. BA PA'JI decided 13th June 1678.
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We see nothing in Act XIV. of 1859 to cut down what was the received meaning of "immoveable property" before the Act was passed. We think that the rules of construction which we have mentioned are stronger than any argument drawn from such a circumstance as that Act XIV. of 1859 was an English Act, passed by an English legislature, and, therefore, that the term "immoveable" should receive the construction which that word ordinarily bears in common parlance amongst English people. It is not a *vercubulum artis* of the English law, and has not by it had any such indelible character stamped upon it as to counter-vail the meaning heretofore attributed to it in this Presidency amongst the majority of its population, and by the most skilled English writers upon Hindu law.

Nor do we find in subsequent Acts anything calculated to give us the impression that the received doctrine as to immoveable property amongst Hindus was wrong, or that Act XIV. of 1859 was intended to narrow the scope of that phrase, or to show that it is not a term elastic enough to suit itself to the law of any community to whose property it may be necessary to apply it.

We observe in the new Limitation Act IX. of 1871, which enters much more into detail than the previous Acts, that twelve years is the limit applicable to suits for the possession of an hereditary office: Schedule II. art. 123; and that the same limit is applicable to suits to establish a periodically recurring right (art 131,) and to suits for money charged upon immoveable property including *Málikána* and *haqq*s (haks): art. 132.

Sir W. Macnaghten, whose work was published subsequently to 1827, *i.e.*, in 1829, includes slaves and corodies amongst immoveable property. Vol. I. p. 1.

We are of opinion that Cl. 12, and not Cl. 16, of Section 1 of Act XIV. of 1859 is applicable to a suit to recover the fees of an hereditary office, such as a village Joshi.

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It may be that *Krishnabhat v. Kapabhat* (f) decided by COUCH, C.J., and GIBBS, J., which this decision upholds, may be inconsistent with *Rajji Manor v. Desai Kallianrai* (g) and the like cases which treated *todá garás* as moveable property and the limit, to suits for it, as six years. It is unnecessary for us now to decide whether or not this inconsistency exists. For my own part, I may say that I have had considerable doubts as to the soundness of those decisions as to *todá garás*.

Having answered the only question submitted for our decision, we remit this case to the Division Court (with that answer) for final disposal.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 22 of 1871.

March 13.

PIRJA'DA' NASARUDIN.....Appellant.

VENKAT PRABHURespondent.

Jurisdiction—North Kanara—Decree passed by Principal Sadr Amín—*Execution of such decree*—Act (Bombay) III. of 1863 Secs. 6 & 7—Act XIV. of 1869.

A decree passed by a Principal Sadr Amín of the district of North Kanara before that district was transferred to the Bombay Presidency, should be executed by the First Class Subordinate Judge who has succeeded to the Court and functions of such Principal Sadr Amín, and cannot by him be delegated for execution by a Second Class Subordinate Judge, though the amount of such decree be less than Rs. 5,000.

The provision in the Bombay Courts' Act (XIV. of 1869), that in suits under Rs. 5,000 the Second Class Subordinate Judges only shall have jurisdiction, does not affect the execution of decrees passed before that Act came into force.

THIS was a miscellaneous special appeal from an order of A. L. Spens, Acting District Judge of Kárwár, reversing an order of Venkatráv Pándurang, Second Class Subordinate Judge at Kárwár.

(f) 6 Bom. H. C. Rep. A.O.J. 137. (g) *Ibid* 53.
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 PIRJÁDÁ heir, held a decree for Rs. 1,300 against Venkat Prabhu,
 NASARUDIN which had been passed by the Principal Šadr Amín of
 v. VENKAT Honore, on the 9th April 1863.
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Bombay Act III. of 1863, Sec. 6, enacts that the district of North Kanara, with the exception of the Taluka of Kundapur as transferred from the Presidency of Fort Saint George, shall, from and after the 16th day of April 1862, be subject to the Regulations and Acts which are or shall at any time hereafter be in force within the territories subject to the Presidency of Bombay.

And Sec. 7 enacts, that nothing in that Act shall affect any acts done, or proceedings held, or any sentence passed, or order made in the district of North Kanara, previously to the passing of that Act (15th April 1863).

Under Act VII. of 1843, Section 4 (Madras Code), the jurisdiction of a Principal Šadr Amín in the Madras Presidency extended to suits of the value of Rs. 10,000. By Madras Regulation III. of 1833, a Munsif's jurisdiction was limited to suits whose value did not exceed Rs. 1,000.

In the Bombay Presidency, by Act XIV. of 1869, the jurisdiction of a Second Class Subordinate Judge is limited to suits of the value of Rs. 5,000, while the jurisdiction of a First Class Subordinate Judge is unlimited.

On the 27th August 1868, Pirjádá, as heir of Padshá Sáheb, applied to the First Class Subordinate Judge at Sirai, to grant a certificate that the decree of the 9th April 1863 had not been satisfied within the jurisdiction of that Court and to transfer the execution of that decree to the Court of the Second Class Subordinate Judge of Kárwár. The application was rejected, and Pirjádá was ordered to apply directly to the Subordinate Judge's Court at Kárwár. Accordingly, Pirjádá, on the 15th September 1868, applied to the Kárwár Subordinate Judge's Court for execution, which the Court granted. Venkatráv, thereon, appealed to the District Judge of Kárwár against the order of the Subordinate Judge. In appeal the District Judge raised the issue "3. What

Court is competent to execute the decree?" On that issue, he found that the First Class Subordinate Judge at Sirsi, and not the Subordinate Judge at Kárwár, was competent to execute this decree.

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The order of the Subordinate Judge at Kárwár was accordingly reversed on the 21st January 1871. Against that order, Pirjádá presented the present special appeal on the 27th April 1871.

The appeal was argued before WESTROPP, C.J., and LLOYD, J., on the 13th March 1872.

Marriott (with him *Shántarám Náráyan*), for the appellant.

Anstey (with him *Shámráv Vithal*), for the respondent.

WESTROPP, C.J.:—Act III. of 1863, Section 7,* enacts that previous "orders" shall not be by that Act affected; that would include decrees. The Act itself does not purport to provide for the execution of previous decrees.

The Principal Šadr Amín of Honore had power, beyond dispute, to make the decree which he did.

The First Class Subordinate Judge of Sirsi is, in fact, the same Court, and has jurisdiction over the same district.

The provision in Bombay Courts Act, that in suits under Rs. 5,000, the Second Class Subordinate Judge only shall have jurisdiction, does not purport to affect execution of previous decrees.

Ratanchand v. Hanmantráv (a) was decided in the same spirit as we decide this case.

We think that Mr. Spens, the Acting Judge of Kárwár, was right in holding that the 1st Class Subordinate Judge of Sirsi can execute this decree, and, therefore, that Section 284 of Act VIII. of 1859 was not applicable, and that the 1st Class Subordinate Judge could not, under it, delegate the execution of the decree to the Second Class Subordinate Judge of Kárwár.

Appeal dismissed with costs.

* Sec. 7: "Nothing in this Act shall affect any acts done, or proceedings held, or any sentence passed, or order made in the District of North Kanara previously to the passing of this Act."

(a) 6 Bom. H. C. Rep. A. C. J. 166.

[APPELLATE CIVIL JURISDICTION.]

14. 2. 1901 / 31. 12.
15. 2. 1901 / 31. 12. JAMITAT

JAMIFATRA'M RA'MCHANDRA *Appellant.*
 PARBHUDA'S HATHI... *Respondent.*

Hindu Law—Creditor's right to follow assets of a deceased Hindu into the hands of a purchaser for value.

Under the Hindu Law, the property of a deceased Hindu is not so hypothecated, for his debts, as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it into the hands of a person who has purchased it from the heir of the deceased in good faith and for valuable consideration.

Sunbussapa v. Moodkapa (a) and Naroo Huree v. Konbeir Munohur (b) followed.

THIS was a special appeal from the decision of C. G. Kemball, District Judge of Súrát, in Regular Appeal No. 103 of 1868, reversing the decree of the Munsif of Broach.

The appeal was argued before WESTROPP, C.J., GIBBS and LLOYD, JJ.

McCulloch (with him *Shántarām Nárāyan*) for the appellant.

Dhirajlál Mathurádás for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:— Ranchhod Harji being indebted to Jamiyatrám Rámchandra, the plaintiff in this suit, died in A.D. 1853-54, leaving certain land. The land devolved upon his brother and heir, Náran Harji, who sold it in 1859 to the defendant for Rs. 325, as appears by the deed, exhibit No. 9. That deed bears date upon the 28th September 1859, and was registered upon the 30th September 1862.

In 1860 the plaintiff brought a suit against Náran Harji, and obtained a decree in that suit on the 30th October 1860, for the amount due. The lands already mentioned were sold, under that decree, to the plaintiff for Rs. 51 on the 31st March 1864, and a certificate of sale was granted to him under date the 23rd July 1864.

(a) 8 Harr. Bom. Rep. 232.

(b) Ibid. 289.

On the 29th March 1865, the plaintiff brought the present suit against the defendant to recover the land. The Munsif made a decree in favour of the plaintiff.

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The defendant appealed on several grounds to the District Judge, who reversed the decree of the Munsif with costs.

The District Judge and, indeed, the Munsif also, came to the conclusion that the sale in 1859 to the defendant was *bona fide*. The Munsif, however, relying on certain decisions of the Šadr Aḍalat, was of opinion that Nāran Harji could not sell the land discharged from the debts of Ranchhod Harji. The District Judge thought that those decisions were unsustainable, and on the authority of *Unnopoorṇa Dassea v. Gunga Narain Paul* (c) held that the sale by Nāran Harji was valid against the creditor of Ranchhod Harji.

The plaintiff has made a special appeal to this Court against the decree of the District Judge. The only point argued before us was the point already noticed as to the validity of a *bona fide* sale made by the heir of a deceased Hindu debtor.

For the plaintiff the following passage in Mr. Grove Grady's Hindu Law has been relied upon :—"The assets of the debtor may be pursued by a creditor into whosoever hands they may come : Yājñavalkya 1 Dig. 270 ; 1 Stra. H. L. 166 ; 2 *Ibid* 280, 282 ; as property descends on the death, whether natural, presumed, or civil, so the liability then arises ; Vishnu, 1 Dig. 266 ; 1 Stra. H. L. 166." p. 79.

The proposition that the assets of the debtor may be pursued into whosoever hands they may come is too broadly stated in 1 Stra. H. L. 166, and in the remark of Mr. Colebrooke in 2 Stra. H. L. 282, whence Mr. Grove Grady appears to have taken it, and is not warranted by the passage quoted by Colebrooke from Nārada, 1 Dig. 272, * which is as follows :—"Of the successor to the estate, the guardian of the widow, and the son *not competent to the management of affairs*, he who takes the assets

(c) 2 Calc. W. Rep. Civ. R. 296.

* Bk. I, ch. V. pl. 172.

1872. becomes liable for the debts; the son, *though incompetent,*
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 RA'M RA'MCHAN- nor a successor to the estate; and the person who took the
 DRA widow if there be no successor to the estate nor *competent*
 s. son." On that passage the commentator Jagannátha says :
 PARBHUDA'S "This text may be thus interpreted: whoever takes the
 HATHI. assets, whether he be the *regular* successor to the estate, guardian of the wife, or son of the deceased, but incompetent to the management of affairs, is successor to the estate, and must pay the debts." It is manifest that neither Náráda nor his commentator had in mind the case of an alienee for valuable consideration. Both were evidently speaking of persons who *succeed* to the estate or to its management, and not of transferees or vendees for valuable consideration. The same remark is applicable to the passage from Yájñavalkya 1 Dig. 270, referred to in 1 Stra. H. L. 166 and by Mr. Grove Grady, which is as follows:—"He who has received the estate of a proprietor leaving no son *capable of business* must pay the debts *of the estate*, or on failure of him, the person who takes the wife of the deceased; but not the son whose *father's* assets are held by another." Upon which, Jagannátha comments thus: "The order in which persons are liable for debts, is, therefore, as follows: in the first place, the debtor himself; on failure of him, his son competent *to inherit and manage the estate*; on failure of such, the son's son; if there be no *such grandson*, the great-grandson, wife, uncle, or other heir, who has succeeded to the estate, or the brother or other guardian of it; should there be no such person, he who has taken the widow; if there be none such, a son incompetent *to inherit or to manage the estate*." The nearest approach that we find to the inclusion of a stranger in blood to the deceased in the remarks of Yájñavalkya, Náráda, or their commentator Jagannátha, is in their mention of the second husband of the widow of the deceased (as to whom see now Bombay Act VII. of 1866), and nothing whatever to indicate any intention to refer to a *bond fide* alienee for valuable consideration. Neither of the cases upon which Mr. Colebrook and Mr. Ellis remark in 2 Stra. H. L. 280, 282, touch such a case. They relate to the

liability of the widow. The passage from Vishnu, 1 Dig. 266, cited by Mr. Grove Grady, relates to sons and grandsons; and the *dictum* in Vyavahāra Mayukha Ch. IV. Section IV. pl. 33:—"He who takes the estate must be made to pay the debts of it," is shown by the context to relate to those who take by succession or inheritance, and not to those who take by purchase. So too Ibid Chapter V., Section IV., pl. 16, both of which are founded on the passage already cited from Yājñavalkya.

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In the case of *Kishundass v. Kesoo* (d) relied upon by the Munsif, the Shāstri is represented as having informed the Court "that according to Hindu law no transfer either of self-acquired property, or of property derived by inheritance, would be good so long as debts were unpaid," and the marginal note of the decision is to that effect. The Shāstri seems to have overstated the law, and on looking into the facts of the case, we think that the marginal note of it should have been that "if land belonging to the father and son be partitioned between father and son, the portion of land allotted to the son, as well as that retained by the father, remains liable to the previously incurred debts of the father." Such a state of facts has no bearing upon the present case. *Luggah Fattajee v. Trimbuck Herjee* (e) was the case of an attachment upon the estate of Manuel de Monte, a deceased Portuguese, in the hands of Hindu alienee for valuable consideration to whom it had been sold in the interval between decree and attachment. That decision was most certainly wrong. The Hindu law, whatsoever it may be, had no bearing upon the question of the liability of the estate of a deceased Portuguese to his debts, and the decree before attachment gave no lien to the judgment creditor upon the lands of the judgment debtor. A sale of property, if made for good consideration subsequently to the recovery of a judgment against the vendor, would not be vitiated, even if the sale were made for the purpose of defeating an expected attachment by the judgment creditor: *Wood v. Dixie* (f) *Darvill v. Terry* (g) *Eveleigh v. Purssard* (h).

(d) Morris's S. D. Rep. Part II. p. 108.

(e) Selected Decisions S. D. A. 1820 to 1840 p. 34.

(f) 7 Q. B. 892. (g) 6 H. & N. 807. (h) 2 Moo. & R. 539.

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In *Chenbussappa v. Santappa* (i) relied upon by the Munsif, where after a decree had been obtained against one Sedling Appa, a Hindu, who afterwards died, and whose son, before any attachment had been issued upon the decree, sold a house of the deceased for valuable consideration to Santappa, the Munsif held the sale invalid as against a subsequent attachment sued out by the judgment creditor against Sedling Appa upon the decree, the Munsif so ruled inasmuch as the decree was of date anterior to the sale. The Assistant Judge Mr. Gilbert Elliott reversed his decree and the Şadr Adálat reversed that of Mr. Elliott on Special Appeal, not upon any ground called in aid from Hindu law, but upon the same reason as that given by the Munsif, and upon the authority of the clearly erroneous decision just quoted from select cases S. D. A., p. 24. Both of those decisions were subsequently, as we think, rightly, overruled by the Şadr Adálat in *Sunbassapa v. Moodkapa* (j) and *Naroo Hurree v. Konheir Munohur* (k). And in *Unnopoorina Dassea v. Gunga Narain Paul* (l) Loch and Glover, JJ., held that "it had not been shown from any text of Hindu law that the property of a deceased Hindu is so hypothecated for his debts as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party, who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he have alienated the property" (to that we would add 'if the property alienated would have been sufficient to pay the debt, and if not his liability would extend only to the value of the property' see Bombay Act VII. of 1866) "but he cannot, we think, follow the property."

In that ruling, with the qualification which we have parenthetically introduced, we concur, and upon these grounds we affirm the decree of the District Judge with costs.

Decree affirmed with costs.

(i) 7 Harrington 20 Sp. App. 4151. (j) 8 Harrington 232.
(k) Ibid 289. (l) 2 Calc. W. Rep. Civ. R. 296.

[APPELLATE CIVIL JURISDICTION.]

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May 23.

Special Appeal No. 313 of 8169.

BA'LA'RA'M NEMCHANDAppellant.
APPA' valad DULU, HANMANTA' bin BA'PU,
and MAHA'DU bin VITHURespondents.

Registration—Reg. IX. of 1827, Sec. VI., Cl. I.—Prior unregistered sale with possession—Subsequent registered mortgage without possession—Acts XVI. of 1864, XX. of 1866, and VIII. of 1871.

On the 15th of December 1863, H. purchased from D. for valuable consideration two fields in the Sátára District (to which the provisions of Reg. IX. of 1827 and of Act XIX. of 1843, as to registration, were then applicable) and was duly put into possession of the fields. The deed of sale was not registered.

On the 14th of February 1864 D. mortgaged by a registered mortgage the same two fields to B. who then knew that H. was in possession of the fields as purchaser.

Held that, according to the true construction of Reg. IX. of 1827, Sec. VI., cl. I., the title of H. having been completed by possession, there was no property in the fields left in D. to mortgage to B., and that, therefore, H. (the purchaser) had a better title to the fields than B. the mortgagee.

Semble. The effect would have been the same under the provisions of Act XVI. of 1864 or of Act XX. of 1866.

History of Registration given, and the provisions of different enactments relating to registration compared and discussed.

THIS was a special appeal from the decision of A.C. Watt, Assistant Judge at Sátára, in appeal No. 351 of 1867, confirming the decree of Pándurang Parshráam, Munsif of Nateputay, in the district of Sátára.

The facts are set out fully in the judgment of the High Court.

The appeal was argued before WESTROPP, C.J., LLOYD and MELVILL, JJ., on the 8th June 1870, and again on the 11th January 1871.

Bhairavnáth Mangesh, for the appellant.

Pándurang Balibhadra for the respondent.

Cur. adv. vult.

WESTROPP C.J. :—We think that from the judgment of the Court below we may take the following facts as proved.

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On the 15th December 1863, Dulu, the father of the first named defendant, Appá, sold to the second defendant, Hanmantá, for valuable consideration, two fields (Nos. 185 and 186) in the Collectorate of Sátára, and executed a deed (Exhibit No. 11) of that date, whereby he conveyed those fields to Hanmantá who was then duly put into possession of the same. That deed was unregistered.

On the 18th December 1863, Bálárám Nemchand, the present plaintiff, under a decree for money which he held against Dulu, caused four fields, including the two already mentioned, to be attached. Those two were then in the possession of Hanmantá.

In exhibit No. 35, which is the attaching Kárkun's memorandum of attachment, misdated 11th December 1863, and should have been dated 21st December 1863, that officer notes that he had attached four lots, viz., 185, 186, 187, and 188, and that "at the time of attaching the aforesaid lands Hanmantá bin Bápu stated that Nos. 185 and 186 had been sold to him and were in his possession, therefore, they are written as deducted" (or "excepted").

The attachment seems to have been withdrawn or abandoned by Bálárám Nemchand, and thereupon Dulu, in pursuance of an arrangement with him, executed to him a mortgage bond (Exhibit No. 3) dated 14th February 1864, for Rs. 300, whereby he purported to secure to Bálárám Nemchand Rs. 200, part of the amount, by a mortgage in possession of the four fields Nos. 185, 186, 187 and 188 for ten years, with a clause that if the Rs. 200 were not repaid within those ten years, the mortgage should be converted into a sale.

The present suit was brought by Bálárám against Appá, the son of Dulu who had died, and also against Hanmantá (in respect of Nos. 185 and 186) and against Mahádu (in respect of No. 187) to obtain possession of the fields 185, 186 and 187, the plaint stating that No. 188 had been given into possession of the plaintiff.

Hanmantá defended the suit by alleging his prior purchase, on the 15th December 1863, of the fields 185 and 186

under exhibit No. 11, and his uninterrupted possession; and alleged that the plaintiff's mortgage was obtained from Dulu by collusion.

Mahádu also defended the suit, so far as it affected No. 187.

The Munsif, although admitting that a registered deed is, under Act XIX. of 1843, entitled to priority over an unregistered deed, being of opinion that Dulu had, previously to the execution of the registered instrument (No. 3), not only by No. 11 but also by giving over possession of the fields 185 and 186 to Hanmantá, parted with the whole of his (Dulu's) interest in those fields, and, therefore, had nothing to convey, made a decree in favour of Hanmantá as to those numbers.

He decreed that the plaintiff should recover field No. 187 from Mahádu.

The plaintiff appealed against the decree so far as it related to fields Nos. 185 and 186, alleging (contrary to the fact) that those fields were in Dulu's possession at the date of the mortgage (No. 3) to the plaintiff, and relying on its registration. He also impeached Exhibit No. 11 as fraudulent and denied that Hanmantá ever had possession under it.

At first, the Assistant Judge, being under a mistake as to dates, held the sale to Hanmantá to be fraudulent, and, reversing the Munsif's decree as to him, decided in favour of the plaintiff, but afterwards, on review, restored the Munsif's decree. The Assistant Judge gave no opinion as to the effect of the registration of the mortgage (No. 3).

The plaintiff has specially appealed to this Court. A point, at first made by his pleader as to the review having been granted after the expiration of the 90 days allowed by law for the purpose, and without reasonable cause being shown for the delay, has been abandoned. As to the 5th point of appeal it must fail, as it is manifest that the Judge was not asked to raise the issues mentioned in it. He has, however, as we think, substantially found both of the facts mentioned in it in the affirmative. The only other point

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argued before us was that the registration of the mortgage bond, Exhibit No. 3, dated 14th February 1864, gave it priority over the deed of sale (Exhibit No. 11) dated 15th December 1863, notwithstanding the possession under it, relied on by Hanmantá. It was contended for the plaintiff that this was so because Bombay Act III. of 1863 (which received the assent of the Governor-General in Council on the 15th April 1863, and purported to subject the Collectorate of Sátára, from the 1st January 1863, to the Regulations and Acts which are or shall at any time hereafter be in force within the territories subject to the Presidency of Bombay) had rendered (amongst others) Regulation IX. of 1827 and Act XIX. of 1843 applicable to that Collectorate, and, therefore, to the lands in question in this suit.

What occurred when the plaintiff caused the fields 185 and 186 to be attached, must have given him notice, that Hanmantá was then in possession of those fields, and alleged that they had been sold to him. The mortgage to the plaintiff was not executed until more than two months after the attachment. The question is whether the notice which the plaintiff thus had of Hanmantá's possession and the sale to him, in evidence of which Hunmunta produces his unregistered deed of purchase (No. 11) of the 15th December 1863, prevents the plaintiff's registered mortgage of the 14th February 1864 from taking precedence of Hanmantá's unregistered deed of purchase.

We shall advert, as briefly as may be, to the history of the law of Registration in this Presidency.

Bombay Regulation III. of 1793, Sec. 14, relating to the Court for Salsette, &c., and Bombay Regulation I. of 1800 relating to the Court at Súrat, respectively required the registration of mortgage bonds at the time of passing the same.

Those Regulations were repealed by Reg. I. of 1827. Bombay Regulation IV. of 1802 (for establishing a Registry for Wills and Deeds for the transfer or mortgage of real property as regarded *Súrat and its dependencies*) is, except

in some trivial points, identical with Bengal Regulation XXXVI. of 1793 and Madras Regulation XVII. of 1802. The following sections were common to all three Regulations.

“III. *First.* The Register is authorized and required to register memorials of the following deeds.

“*Second.* Deeds of sale or gift of lands, houses, and other real property.

“*Third.* Deeds of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances.

“*Fourth.* Leases and limited assignments of land, houses, and other real property, including generally all conveyances used for the temporary transfer of real property.

“*Fifth.* Wusseatnamahs or wills.

“*Sixth.* Written authorities from husbands to their wives to adopt sons after their (the husbands’) demise.

“IV. It shall be left to the option of all persons to register or not, as they may think proper, any of the descriptions of deeds specified in the preceding section (mortgage bonds excepted) that have been executed, or which may be executed, prior to” (in Bombay the 1st September 1802, in Bengal the 1st January 1796, and in Madras the 1st January 1805). “The not registering such deeds shall in no wise operate to the prejudice of the rights of the parties thereto, which shall remain the same as if this Regulation had never been enacted.

“V. It shall also be left to the option of all persons to register or not, as they may think proper, the several descriptions of deeds specified in clauses 4th, 5th and 6th of Section III. whether executed previous or subsequent to the” (dates given for the respective Presidencies in Sec. IV). “The not registering of the deeds specified in those three clauses shall in no wise operate to the prejudice of the rights of the parties thereto, which shall remain the same as if this Regulation had never been enacted.” (That must mean as between those parties themselves, for clauses 1 and 2 of Sec. VI. seriously affect their rights as regarding third persons.)

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"VI. *First.* Every deed of sale or gift, of the description specified in Clause 2nd, Section III., that may be executed on or after the" (dates given in Section IV. for the respective Presidencies) "and a memorial of which shall be duly registered according to this Regulation, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property, executed subsequent to the said date, which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed.

"*Second.* Every deed of mortgage, of the description specified in Clause 3rd Section III., that shall have been or shall be registered in pursuance of the requisition in Section XIV. (Bombay) Regulation I. 1800" (in Bengal according to Bengal Regulation XXXVI. of 1793, Section III. and executed on or after the 1st January 1796; in Madras after the 1st January 1805), "and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property, executed subsequent to the said date, which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage.

"*Third.* It being the object, however, of the rules in the two preceding clauses, to prevent persons from being defrauded by purchasing or receiving in gift, or taking in mortgage, real property which may have been before sold, given, or mortgaged; and as persons can never suffer such imposition, when they are apprised of the previous transfer or mortgage of the property, it is to be understood that if any person shall purchase, receive in gift, or take in mortgage, any real property, knowing such property to have been previously sold, given, or mortgaged to any other person, and that the deed of sale, gift, or mortgage, has not been registered, and shall register his own deed, in such case the deed of sale, gift, or mortgage of such subsequent Purchaser, donee, or mortgagee, which may have been

registered, shall not, from the registry of it, invalidate, or be discharged in preference to the unregistered deed of sale, gift, or mortgage, first executed, provided the authenticity of the latter be established to the satisfaction of the Court."

So far as these provisions affected Bengal and Madras, they continued unaltered until 1843.

It will be observed that the rivalry for priority, created by them, is between one deed of sale or gift and another such deed, and between one mortgage and another mortgage, and not as between a deed of sale or gift on the one hand, and a mortgage on the other. (See Section VI., Clause 1 and Clause 2). The cases decided upon Act XIX. of 1843, which, in this respect, was framed upon the same principle, illustrate and establish this view. See *Moharajah Moheshur v Bhikha Chowdry* (a) and the cases there cited by Peacock, C.J. (p. 62), and approved of by him and a majority of the judges, and *Golla Chinna v Kali Appiah* (b).

The whole of the Bombay Regulation IV. of 1802 (containing these provisions) was repealed by Bombay Regulation I. of 1827. Bombay Regulation IX. of 1827 (applying to all of the Regulation Provinces of this Presidency at that time) was substituted for it. The preamble of Regulation IX. of 1827 recited thus: "Whereas it would be conducive to the security of titles to immoveable property, and greatly facilitate the transfer of such property by sale, gift, mortgage, or otherwise, that a register of title deeds should be established in each zilla, and that deeds entered therein should be allowed such a preference as to give the holder an obvious interest in presenting them for registration: And whereas by establishing also a general register in each zilla for all other deeds, obligations, and writings, of whatever nature, effectual means would be provided for the preservation of copies of writings, and great facility afforded in proving their contents, in the event of the originals being lost or destroyed; the following rules are, therefore, enacted, to take effect from such date as shall be prescribed in a Regulation

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(a) 5 Calc. W. Rep. Civ. R. 61.

(b) 4 Mad. H. C. Rep. 434, 441.

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to be hereafter passed for that purpose." In reading that preamble we must recollect that by the law of Hindus, who constitute the great majority of the population and land-holders of this country, a deed or writing is not necessary to effect the transfer of land. That transfer may be fully effected by verbal contract or gift, if accompanied by possession (c). With that rule of Hindu law neither the previously mentioned Regulations, nor this Regulation (IX. of 1827) purported to interfere; and had they so interfered, the result would probably have been frequent injustice to honest vendees and transferees of immoveable property. No doubt it is far more usual that there should be a writing when a sale or transfer takes place than that there should not, but the instances to the contrary were sufficiently numerous to prevent the Legislature from desiring to meddle with the rule of Hindu law that a writing is not indispensable. Reverting to Regulation IX. of 1827, we find that Section III., Clause 1, is as follows: "The register of title deeds shall be appropriated to the registry of sunnuds, deeds of sale, gift, *devise*, or mortgage of lands, houses, offices, or other immoveable property, situated within the Zilla; of awards of arbitrators determining the right to such property so situated, and of deeds of release or discharge of mortgages, or other incumbrances affecting the same, and generally of all documents relating to the right and title to immoveable property within the Zilla." Most probably the word "*devise*," which occurs in that clause, is a misprint for "*démise*," the word "*devise*" being wholly inapplicable to a deed, and applicable only to testamentary writings (wills or codicils). The argument, in favour of the supposition that this is a misprint, seems to be rendered conclusive by the fact that the registration of wills (a term sufficiently large to include codicils) is expressly provided for by Section IV. and directed to be made in "the general register," as distinguished from "the register of title deeds," (d) to which alone Section

(c) 6 Moo. Ind. App. 267; 1 Mad. H. C. Rep. 100; 2 *Ibid.* 37 39;
1 Stra. H. L., 277.

(d) See Section I. Clause 1, and Section IX. Cl. 1.

III. clause 1 has reference. And if the word printed as "devise" in Section III., clause 1, were not intended to have been "demise," the important case of leases, which we might expect to find specially provided for, (as distinguished from deeds of gift, sale, or mortgage which are specified,) would have been left to fall within the concluding general words "all documents relating to the right and title to immoveable property," whereas leases were *eo nomine* provided for in the previous Regulation IV. of 1802, Section III. clause 4. Section VI., clause 1, is: "Every deed or other writing transferring or mortgaging immoveable property situated within the Zilla, if registered in the register of title deeds, shall, without regard to the date of execution, if proved to be valid, be preferred to and satisfied before any deed of the nature of those specified in Section III., clause 1, either subsequently registered or not registered at all; but this preference shall extend only to the immoveable property thereby transferred or mortgaged; provided, however, that if any person shall purchase, receive in gift, or take in mortgage immoveable property, knowing such property to have been previously sold, given, or mortgaged, to any other person, and that the deed of sale, gift, or mortgage, has not been registered, and shall register his own deed, in such case the registered deed shall not, from the registry of it, be entitled to preference over the unregistered deed, if proved to be authentic.

"Second.—Deeds, or other writings, transferring or mortgaging immoveable property, if not registered in the register of title deeds, shall not on that account be invalidated or null; but shall stand in regard to each other unaffected by the rules relating to registration."

That Section (VI.) did not limit the competition for priority to documents *ejusdem generis* only, but, as we think, most reasonably rendered it general amongst all deeds, mortgages, or other documents (except, as already suggested, testamentary documents) relating to the right and title to immoveable property.

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The concluding proviso in Section VI., clause I., of that Regulation (IX. of 1827) as to the effect of knowledge or notice of unregistered documents, as well as the similar provisions contained in Bengal Regulation XXXVI. of 1793, Section VI., cl. 3, and Madras Regulation XVII. of 1802, Section VI., clause 3, were repealed by Act I. of 1843, the preamble of which is "Whereas the Registry Laws now in force in the respective Mofussils of Bengal, Madras and Bombay, provide that registered conveyances and other instruments affecting titles to land and other interests therein shall not take precedence of unregistered conveyances and instruments in cases where the party registering shall have known of the existence of such unregistered conveyances or other instruments; and whereas a complicated system of law has arisen out of the construction which is to be given to the provisions regarding the knowledge of parties, or notice had by them in such cases; and whereas much perjury has been committed in investigations touching the fact of such notice or knowledge, and much of the time of the Courts has been occupied with such investigations; and whereas in consequence of forgeries, perjuries, fraudulent concealments, and other practices, no person purchasing or advancing money on the security of land can safely rely on the conveyances or other instruments affecting the title to such land or other interest therein affording, by means of their being registered, a security against conveyances or instruments being set up, as of previous date, by unregistered claimants."

The first remark which that preamble suggests is that the notice or knowledge spoken of there is notice or knowledge of unregistered conveyances, and the same remark may substantially be made of the concluding proviso in cl. 1 of Section VI. of Regulation IX. of 1827, for the words there, "knowing such property to have been previously sold, given, or mortgaged, to any other person," are immediately connected with "and that the deed of sale gift, or mortgage, has not been registered." Neither the preamble to Act I. of 1843, nor the concluding proviso in clause 1. of Section VI., Regulation IX. of 1827, which latter, together with the pro-

visions as to notice in the Bengal and Madras Regulations, that Act's preamble proposes for repeal, had any reference to notice or knowledge of *verbal contracts* as to immoveable estate, or notice, or knowledge of *possession* under any contract either in writing or oral.

The enacting part of Act I. of 1843 is as follows: "It is hereby enacted that all provisions contained in any Regulation or Regulations of the Bengal, Madras or Bombay Codes, touching such knowledge or notice as aforesaid of previous unregistered conveyances or instruments affecting titles to land or other interests therein, shall be repealed from the first day of May next; and every conveyance or other instrument affecting title to land, or any interest in the same, authorized by those Codes respectively to be registered, shall, so far as regards any lands to which the same relate, be void as against any person claiming under any subsequent conveyance or other instrument duly registered, unless the prior conveyance or instrument shall have been duly registered before the registration of the subsequent conveyance or instrument; any alleged notice or knowledge of such prior conveyance or instrument notwithstanding: Provided always that this Act shall not be construed to extend to any conveyance or other instrument made before the first day of May next."

That Act, except so far as it repealed the provisions in previous Acts as to notice or knowledge of unregistered documents, was itself repealed by Act XIX. of 1843, Section I. The 2nd section of the last-named Act enacted that "from the 1st day of May last past, every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has

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been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge, or notice, of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding: Provided always that nothing in this section contained shall be construed to extend to any deed or certificate made before the said 1st day of May last past."

"Section 3. And it is hereby declared and enacted that no conveyance or other instrument affecting title to land, or any interest in the same, whether made before or after the said 1st day of May last past, other than such deeds or certificates as aforesaid, are or shall be in any respect void for want of registration, any act, regulation or law to the contrary notwithstanding."

The above quoted 2nd section of Act XIX. of 1843 is drawn rather upon the model of Bengal Regulation XXXVI. of 1793 Section VI. clauses 1 and 2; Madras Regulation XVII. of 1802 Section VI. cl. 1 and 2; and the previously repealed Bombay Regulation IV. of 1802, Section VI. clauses 1 and 2, than of Bombay Regulation I. of 1827, Section VI. clause 1, which gave the preference to the prior registered instrument, whether it might be a mortgage, or a deed of sale, or gift, and did not limit the competition for priority to instruments *ejusdem generis* as did the Madras, Bengal and previous Bombay Regulations (e). It has, however, been held, in *Parshotum Ranchod v Jagjivan Mayaram* (f) that the first part of clause 1, Section VI. of Bombay Regulation IX. of 1827 was then (September 1863) in full force, (the latter part as to the effect of knowledge or notice having been expressly

(e) See per Peacock, C.J., in 5 Calc. W. Rep. Civ. R. 61, 62, and in 1 Beng. L. R. 200, and see the cases referred to by him in both of these places.

(f) 1 Bom. H. C. Rep. 60.

repealed by Act I. of 1843). The Court said : " Whatever may be the effect of Act XIX. of 1843, we think that it has not deprived the appellant of the right to rely on Regulation IX. of 1827, Section VI. The latter portion of the first clause of that section, relating to notice of unregistered documents, has been repealed by Act I. of 1843, but the first part of that section which, taken together with Section III. of the same Regulation, clearly provides that a deed of sale duly registered shall be preferred to and satisfied before a deed of mortgage unregistered, or registered at a subsequent date, has not been repealed by Act I. of 1843, Act XIX. of 1843, or any other enactment of which we are aware." That decision has, upon that point namely that the first part of cl. 1, Sec. VI. of Regulation IX. of 1827 was not repealed by Act I. or Act XIX. of 1843, been frequently and uniformly, as we believe, followed here ; *ex. gr. Ganpat v. Khandu (g)* where a purchaser with possession, whose deed was registered, was preferred to a previous mortgagee of 1863, unregistered and without possession. Since that decision in 1 Bom. H. C. Rep. 60 was made, Acts XVI. of 1864, XX. of 1866 and VIII. of 1871, relating to Registration, have been passed ; the first of which repealed Regulation IX. of 1827 and Act XIX. of 1843, but the law applicable to the present case (introduced into Sâtara by Bombay Act III. of 1863 from the 1st January 1863), is the law as it stood in the Bombay Mofussil Regulation Provinces before Act XVI. of 1864.

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In a note to Section 2 of Act XIX. of 1843 in Volume I. of Mr. West's Acts p. 269, there is a reference to Special Appeal No. 711 of 1864, as showing that Act XIX. of 1843 " does not affect the validity of a mortgage as against a sale, or *vice versa*," but on examination of the record in that case and of my own note book, I find that Special Appeal No. 711 of 1864 was an action to recover damages for a libel, and that no question of registration arose in it. There must be an error in the reference.*

(g) 4 Bom. H. C. Rep. A. C. J. 60.

* It would appear that 711 in Mr. West's note is a misprint for 751 which is the real number of the Special Appeal referred to.—Ed.

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It is evident that the mere circumstance, that the plaintiff had notice of Hanmantá's *unregistered deed* (No. 11), would not alone be sufficient to defeat the registered mortgage to the plaintiff. The repeal of the latter part of clause 1 Section VI. of Regulation IX. of 1827, and of the provisions as to notice of unregistered conveyances in the previous Bengal and Madras Regulations, settles that point. To hold otherwise would be to frustrate the intention of the Legislature: *Krishnasami v. Venkatáchella* (h).

But the plaintiff here had, before taking his mortgage, notice of what was far more important than the unregistered conveyance. He knew that Hanmantá was in possession of fields 185 and 186, and that he (the plaintiff) had been foiled in his attempt to obtain against them execution of his decree.

We are aware of the dictum of Sir B. Peacock, C.J., in *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi* (i) where he said: "Assuming, for the present purpose, that before the deed was executed there was a distinct verbal sale of the property, which between these parties, there being no Statute of Frauds, would have operated as a transfer of title, if no deed had been executed, I am of opinion that when the transaction was completed by the execution of a deed, the parties must be considered to have intended that the verbal sale was not to be the operative one, or the conclusion of the transaction between them. I agree with the remark of the Division Bench in *Manmohini Dasi v. Bishenmayi* (j) where "a party comes into Court resting his claim on a written title *which the law requires to be registered*, he cannot, when he has failed to register, and is, in consequence, unable to use his title deed, turn round and say I can prove my title by secondary evidence." Sir B. Peacock's observations had reference to Act XX. of 1866, and those of the Division Court, which he quoted from 7 Calc. W. Rep. 112, referred to Act XVI. of 1864, both of which enactments are imperative as to the registration of

(h) 3 Mad. H. C. Rep. 89. (i) 1 Beng. L. R. 58, 79, F. B. R.

(j) 7 Calc. W. Rep. 112.

documents transferring any estate, or interest, in immoveable property, exceeding Rs. 100 in value, and render such documents, if unregistered, inadmissible in evidence. But neither Regulation IX. of 1827, nor Act XIX. of 1843, rendered registration compulsory, nor unregistered documents inadmissible in evidence. Sir B. Peacock said nothing in that dictum as to what would, in his opinion, have been the effect of possession by the first vendee. In *Bhāndu Rājārām v. Dāmāji Jivāji* (k) Couch, C.J., and Gibbs, J., adopted and acted upon the same views as those enunciated *obiter* by Peacock, C.J., in *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*, and held that a deed of sale of immoveable property, registered under Act XX. 1866, was entitled to precedence over a previous verbal sale of the same property, accompanied by possession, where it appeared that it was the intention of the parties to the verbal sale to complete the transaction by a deed, and further expressed their opinion that having regard to Sec. 48 of the Act, the rule would be the same even if the parties had no such intention. The authority of that case has been shaken by the decisions in which possession by the first purchaser has prevailed against registration by the second purchaser, to which we shall refer.

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Kylash Chunder v. Gopal Chunder (l) was a case under Act XIX. of 1843, where the plaintiff sued for specific performance of a verbal contract of sale accompanied by part payment of the purchase money. Some of the defendants, relying on a subsequent deed of sale which was registered, resisted the suit. The report is meagre. It is, however, plain that the plaintiff, who claimed under an oral contract, was not in possession, and there is nothing to show that the defendants, who relied on the registered deed of sale, had any notice of the oral contract. If that be so, it was unnecessary for the Court to resort to the law of registration. They (Trevor and G. Campbell JJ.) said:—"It seems unnecessary to go into the question whether, according to the custom of this country, a verbal contract for the sale of land would be binding, for it seems quite clear to us that the case

(k) 6 Bom. H. C. Rep. A.C.J. 59. (l) 1 Calc. W. Rep. Civ. R. 78.

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is governed by Act XIX. of 1843, which gives to registered deeds of sale an absolute preference over all other deeds which have not been so registered. Even if there be question as to whether a verbal contract is a deed, we have no doubt that, on the principle of *a fortiori*, a verbal contract must also be invalidated. Since then the plaintiff has not obtained, prior to the registered sale, so complete a transfer in respect of possession and title as to render the subsequent deed altogether inoperative against him, he cannot claim under any unregistered prior contract to the detriment of a party holding *bona fide* under a subsequent registered deed. We, therefore, dismiss the appeal with costs." How a verbal contract could possibly be regarded as a deed, it is difficult to perceive; and the argument that, inasmuch as a registered deed must invalidate an unregistered deed, which is mentioned in the Act, a registered deed must also invalidate a verbal contract (which is not referred to either directly or by way of implication in the Act), is to our minds a clear *non sequitur*. The Act is conversant of conveyances only, and it would be a strong measure, and contrary to the ordinary canons of interpretation, to hold that the legislature intended to infringe upon the common law of Hindus or others further than it has distinctly signified. That common law did not require registration of documents relating to immoveable property, the legislature has required it; but it has not, in the Regulations or in Act XIX. of 1843, given utterance to any intention whatever to diminish the effect of a verbal contract accompanied with possession.

Gooroo Dass Dan v. Kooshoom Koomaree Dossee (n) arose under Act XVI. of 1864, and the property being less than Rs. 100 in value, the registration of a conveyance relating to it was optional (n). The defendant's deed of sale was registered, the plaintiff's, which was of earlier date, was unregistered. The Lower Appellate Court did not find that the plaintiff ever had possession under his deed, and his possession was not an admitted fact. Kemp J., after referring to those

(n) 9 Calc. W. Rep. Civ. R. 547.

(n) See 9 Calc. W. Rep. Civ. R. 282, as to optional registration.

circumstances, said: "But be that as it may, the deed of the special respondent (defendant) being registered and that of the special appellant (plaintiff) not being so, the former must prevail." The fact of possession by the plaintiff not having been either found or admitted, the remark as to the possible effect of possession was extra-judicial. E. Jackson, J., said that no fraud had been found against the respondent, and it could hardly be said that any had been alleged; and he admitted that the defendant's deed, though registered, ought not to be enforced, if the defendant had been a party to the fraud of the vendor. He said "A long undisturbed possession by the appellant (plaintiff) and knowledge of that fact by the subsequent purchaser would be proof of his having acted fraudulently. But the possession in this case was, as stated by the plaintiff, only recent; and there is no attempt at proof that the defendant was aware of that possession." The length of the possession, if the possession were *bonâ fide* that of a purchaser for valuable consideration, does not seem material, except in so far as it increases the probability of its being known to the second purchaser. Where, as here, it certainly was known to the subsequent claimant (the mortgagee), the length of possession by the first purchaser (being *bonâ fide* and for valuable consideration) is immaterial. As an illustration, however, of the possible injustice of holding that Regulation IX. of 1827, or Act XIX. of 1843, or, indeed, Acts XVI. of 1864 and XX. of 1866, invalidate a fair verbal contract accompanied by possession in favour of a subsequent registered deed, we may take the case of a man who has held land in his possession for 11 years and 11 months under a verbal contract of sale for valuable consideration before the execution by his vendor of a registered conveyance by way of sale, also for valuable consideration, to another person, who never inquires as to the possession before he purchases. He would not be guilty of fraud, but would of negligence, yet if the Regulation and Acts in question affect verbal contracts accompanied by possession, the first purchaser would be liable to be turned out of possession in a suit brought by the second purchaser before the 12th month of the 12th year had expired. Before determining that such was the

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effect of those enactments, we should make certain that the Legislature, by expression or unmistakeable implication, laid down such a rule, but, in fact, we wholly fail to find it either in Regulation IX. of 1827 (the enactment applicable to this case) or Act XIX. of 1843 (which is not applicable, the competing parties here being a vendee with possession whose deed is unregistered, and a subsequent mortgagee with notice, and without possession, but whose mortgage is registered). It has been held in Calcutta by two able judges that even Act XX. of 1866, which presented much greater difficulty than Regulation IX. of 1827, has not affected contracts completed by possession. However, before referring more fully to their decisions, I shall mention some others of a different tendency. The authorities as to the effect of possession are conflicting. Under such circumstances we think that we are at liberty, on a reconsideration of the enactments themselves, to give to them the construction which seems to be most reasonable and most consistent with the intention of the Legislature, and to depart no further than is necessary from the usage of the country.

The importance of possession is shown in a case in Bellasis Rep. p. 5 (in which no question as to registration arose). There a mortgagee puisne in point of time, but with possession, was preferred to a mortgagee prior in time, but without possession.

In Bellasis, p. 9, a *registered* mortgage without possession was preferred to an unregistered mortgage of later date with possession. In such a case the first mortgage being registered, the puisne mortgagee, if he had taken the precaution of searching the registry, would have discovered the existence of the first mortgage, which had the double advantage of registration and of priority of date. Such was also the case in *Sundar Jagjivan v. Gopal Eshvant* (o). The mortgage was registered, and, though without possession, was preferred to a subsequent deed of sale with possession.

Harnamgir v. Spiers (p) was decided by Mr. Justice
 (o) 4 Bom. H. C. Rep. A. C. J. 68. (p) 2 Bom. H. C. Rep. 204.

Newton and myself in 1864. The facts, so far as they are material on the present question, were that the defendant H. being a mortgagee in possession from 1840, the equity of redemption was conveyed to him by Saduddin, an heir of the mortgagor, by a Miráspatra, in 1855, which was not registered. The defendant continued in possession until 1859, when Saduddin and his wife and brother, who claimed to be co-heirs with Saduddin, conveyed the same lands to Spiers by another Miráspatra which was registered. Spiers brought a suit as owner of the equity of redemption against H. to redeem the mortgages. H. relied upon the unregistered Miráspatra of 1855 and his possession, but the Court held that, under Act XIX. of 1843, the registered Miráspatra of 1859 invalidated the unregistered Miráspatra of 1855. On the assumption that Saduddin had power to convey the lands, I doubt that we were right, inasmuch as the transaction of 1855 had been completed by possession, and Spiers, when taking the Miráspatra of 1859, was aware of the Miráspatra of 1855, and, although it is not so stated in the report of the case, or in the judgment of the Acting Judge, must, I think, have been at the same time aware also of the fact, that H. had been for some time and then was in possession of the land under the unregistered Miráspatra. I now think that, assuming Saduddin's powers to convey, we should have treated the Miráspatra of 1859 as having been taken by Spiers in fraud of H. the defendant, and further that the sale to H. having been completed by possession, ought to have been upheld. The effect of possession does not appear to have been discussed by the Court although touched upon by the defendant's counsel. There was considerable doubt as to Saduddin's title to convey alone, so that, even if the Court had been of opinion that the point on the registration law was not fatal to the defendant H's case, the decision might, on the other ground, have been adverse to him.

In *Parabhudás v Dhondú* (q) decided by Newton and Warden, JJ., the prior purchaser, claiming in virtue of an

• (q) 2 Bom. H. C. R 222.

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ed conveyance to A in 1854, and that A, having mainly relied on it in his plaint, could not, in that suit, be permitted to fall back on his prior mortgage. We, for the same reason given by us as to the decision in *Parabhudas v. Dhondu*, doubt that on the question of registration, that case was rightly decided, the sale to A having been perfected by possession. Babaji Tannaji, however, might have rested, so far as regarded the conveyance of 1854, on his being a purchaser in 1856 for valuable consideration without notice. But we think that A, having stated the mortgage to him in his plaint, ought, in order to avoid circuity of action, to have been allowed to fall back upon the mortgage in that suit, instead of being compelled to bring another suit afterwards in which he succeeded in establishing his mortgage (r) against the second purchaser, Babaji Tannaji.

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In *Prahlad Misser v. Udit Narayan* (s) a mortgagee of a village, having sued on his mortgage (dated in 1863 and registered), obtained a decree in March 1864, under which the village was sold in April 1864 to the plaintiff. Another mortgagee (the defendant) of the same village, having sued on his mortgage (dated in 1859 but unregistered), obtained a decree in July 1864, under which the village was sold to himself in March 1865. Under Act XIX. of 1843, the plaintiff was declared entitled to priority, the mortgage upon which the decree, under which he purchased, was founded, having been registered. *It does not appear that either mortgagees had ever been in possession of the village*, nor was it alleged that the registered mortgagee had notice of the earlier mortgage. The case therefore was plain.

We now proceed to refer to the decisions in which possession by the first purchaser has prevailed against registration by the second purchaser.

In *Bhyrub Chunder Misser v. Ramchunder Bhuttacharjee* (t) it was held that where an unregistered sale had been fully proved, as well as possession under it, and a subsequent registered deed of sale was set up, the mere fact of the

(r) 2 Bom. H. C. Rep. 198.

(s) 1 Bang. L. Rep. A.C. 197.

(t) 1 Hay 261.

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In *Syud Fursund Ally v. Syud Abdool Ruhim (u)*, a special appeal heard by Steer and Phear, JJ., in 1865, the facts were that A in 1862 executed, for valuable consideration, a deed purporting to be a conditional sale by way of mortgage of land to the defendant who was then put into possession. In 1863 A sold the same land to the plaintiff by a kabálá or deed of sale which was registered. The decree of the Lower Appellate Court for the defendant was questioned on two grounds: 1st.—That the Lower Appellate Court had assigned insufficient reasons for holding the mortgage to be genuine and valid—which objection was overruled, and 2nd.—That the mortgage being unregistered and the kabálá being registered, the latter was entitled to priority, but the Court said: “We are of opinion that Act XIX. of 1843 does not apply to a case where enjoyment has actually taken place under the first deed.”

Imrit Singh v Koylashoo Koer (v) heard by Kemp and Glover JJ., was a case in which the plaintiff, claiming under a registered deed of sale dated in 1867, sued to obtain possession of a mango garden, which had been purchased by the defendant in 1862, under a kabálá which was unregistered; the Court, relying on the last-mentioned case, sent the cause back for retrial with an expression of its opinion to the Judge that if, after weighing the evidence on both sides, he should find the defendant in possession from the time of his purchase, under a *bond fide* executed deed of sale, his judgment should be in the defendant's favour.

The most important case on this question is *Selam Sheikh v. Baidonath Ghatak (w)* decided by L. S. Jackson and Markby JJ., in which the legal value of possession is considered, and where it was held that if a verbal grant of land, alleged to have been made in 1867, were so made, and possession under it then delivered to the grantee, his title ought to prevail

(u) 4 Calc. W. Rep. Civ. R. 30.

(v) 11 Calc. W. Rep. Civ. R. 559 A. C. J.

(w) 3 Beng. L. R. 312 A. J.; S. C. 12 Calc. W. Rep. Civ. R. 217.

against a subsequent purchaser claiming under a registered deed of sale executed in 1868. The subsequent purchaser relied on Sec. 48 of Act XX. of 1866, which provided "that all instruments duly registered under this Act, and relating to any moveable or immoveable property, shall take effect against any oral agreement or declaration relating to the same property." Mr. Justice Markby, who delivered the judgment of the Court, said: "It would certainly appear, applying ordinary principles of construction to these words, that as against the holder under a registered title, the holder under a title derived from a parol agreement would be in all cases defenceless. If the case falls within Sections 17 and 48, the parol agreement cannot be given in evidence. If the case falls within Sections 18 and 48, the parol agreement is of no avail. And unless some distinction can be discovered, which is not at first sight apparent, the purchaser—no matter whether of an article of food at a shop over the counter, or of a piece of land worth Rs. 10,000—under a parol agreement, has, against a subsequent registered purchaser, a defective title. The consequences of such a construction need hardly be pointed out. Probably no one, who has purchased any of the ordinary articles of daily use or consumption since 1866, would be able to make out a safe title to them, nor would it be possible to acquire a safe title to the most trivial thing imaginable without the expensive and troublesome formality of a registered instrument. I think it quite impossible that the Legislature intended the Act to apply to such cases as these, and it is, therefore, necessary to search for some distinction which will enable us to escape from this conclusion. The choice seems to me to lie between these three courses; either (1st) to hold that when possession is delivered, the strict rules laid down in the Registration Act do not apply; or (2nd) to put some limit upon the words "declaration or agreement" in Section 48; or (3rd) to make some distinction between moveable and immoveable property." After showing that it is impossible to adopt the 2nd or 3rd course, he proceeds: "There yet remains the first of the three alternatives which I mentioned above, namely, to hold that the strict provisions as to registration do not apply where possession of the thing

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to be transferred is given by the owner to the transferee. It is true that there is nothing in the words of the Act, which expressly authorises such a distinction; but, on the whole, I cannot help thinking that it must have been intended. It would be very strange, if just when the Law Commissioners were reporting that the provisions of the English Statute of Frauds, which require contracts to be in writing, were 'not suited to the habits and present condition of the people in India,' the Legislature here should pass a Registration Act, which makes not only a writing but a registered writing necessary for every transaction relating to an interest in land or goods of whatever value, which would be a Statute of Frauds for India going far beyond the Statute of Frauds in England in its requirements, and extending over all the ordinary transactions of daily life. I think the Legislature cannot have intended the provisions of Sections 17, 18, and 48, to apply to cases of transfer of an interest in moveable property, where the transfer is followed by putting the transferee in possession; and if they do not apply to this case, where the subject of transfer is moveable property, neither do they apply to a similar case where the subject of the transfer is immoveable." He then refers to a case in 10 Calc. W. Rep. 231, decided by Phear and Hobhouse, JJ., as inconsistent with the views expressed by Steer and Phear, JJ., in the case above cited from 4 Calc. W. Rep. 30, and gives the preference to that in 4 Calc. W. Rep. 30. After quoting the following passage from the Mitákshará Chap. III. Sec. 6 pl. 1, in Macnaghten*: "It has been shown that possession, when accompanied by a title, affords evidence of right; but lest it should be supposed that a title without possession affords equal proof, it is declared: 'Where there is not the least possession, there a title is not weighty.' Such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight," he referred to the cases above mentioned by us as those decided on Act XIX. of 1843, and in which possession of an unregistered grantee prevailed against registration by a subsequent grantee without possession.

* Macnaghten H. L. p. 217.

In those views of Markby, J., concurred in, as they were, by L. S. Jackson, J., we agree. The last mentioned learned Judge and Mitter, J., acted upon them in 1870 in *Narsing Por-kast v. Mussamat Bewah* (x) and held that where possession of immoveable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession on the ground of the priority of his deed under Section 48 of Act XX. of 1866.

Selam Sheikh v. Baidonath Ghatak is mentioned apparently with approbation by Glover and Mitter, JJ., in *Gouree Kant Roy v. Gridhur Roy* (y). It may be useful to mention here that the new Registration Bill, when introduced in 1870, contained the two following clauses :—

“48. All documents, not testamentary, duly registered under this Act, and relating to any immoveable property, shall take effect against any oral agreement or declaration relating to such property, whether possession thereof has or has not been delivered.

“49. All documents, not testamentary, duly registered under this Act, and relating to any moveable property, shall take effect against any oral agreement or declaration relating to such property, unless when the agreement or declaration has been accompanied or followed by delivery of possession.”

The judgment of Markby, J., above quoted, is referred to in the statement of objects and reasons, as the reason for the introduction of those two sections. The distinction made between moveable and immoveable property, as to the effect of delivery of possession, was abandoned in Committee, Mr. Cockerell, the mover of the bill, saying: “The bill as introduced, in modification of the present law, was framed so as to give effect to a registered instrument relating to immoveable property against any oral agreement regarding the same property, irrespective of any circumstances attending such agreement. Such a provision, it has been rightly contended, would amount practically to the enforcement of written contracts for the conveyance of immoveable property

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(x) 5 Beng. L. R. Appx. 86.

(y) 12 Calc. W. Rep. Civ. R. 456.

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or any interest therein, and would seriously disturb the law of property in force in this country. Some alteration of Act XX. of 1866 on this subject was clearly necessary to qualify the absolute superiority which the wording of Section 48 of that Act *apparently* gave to the registered instrument over the oral contract. Oral agreements, therefore, when accompanied or immediately followed by the delivery of possession of the property to which they relate, have been saved from the preferential rule in the Bill as now amended." Accordingly Section 48 of Act VIII. of 1871 is as follows:—

"48. All documents, not testamentary, duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement has been accompanied or followed by delivery of possession."

In our opinion, Hanmantá's deed of purchase (No. 11), though unregistered, yet being accompanied by possession, must be preferred to the plaintiff's subsequent mortgage though registered; this, we think, being in accordance with the true construction of Regulation IX. of 1827, Section VI., clause 1, which governs this case. The same ruling would, we think, be proper, if the case were governed by Act XVI. of 1864, or Act XX. of 1866. As to whether it would be so under Act VIII. of 1871, we think it advisable to reserve our opinion until such time as the question may arise.

We further think that although, so far as regards the supposed tampering with the date of the *Jupti Pati* (the karkun's memorandum), the plaintiff must stand exonerated by the finding of the District Judge from any charge of fraud, yet the indisputable facts, that the plaintiff knew of the defendant Hanmantá's purchase of the 15th December 1863, and that Hanmantá was in possession under it, and that consequently he (the plaintiff) was unable to render his attachment effective and to execute his decree against Hanmantá's fields 185 and 186, establish the existence of collusion between the plaintiff and Dulu, and that the taking a mortgage from Dulu, in February 1864, of those fields amounts

144 Bom. L.R. 164.
14 R 2 Bom. L.R. 542.

in law to fraud on the part of the plaintiff, and renders his mortgage void as against Hanmantá (z).

We, therefore, affirm the decree of the Assistant Judge with costs.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 547 of 1870.

MANMAL valad SURATMAL *Appellant.*

DASHRATH valad NA'RA'YAN *Respondent.*

*Registration—Priority—Certificate of Court's sale—Possession—Act
XX. of 1866.*

An unregistered deed of sale accompanied by immediate possession ought to be preferred to a subsequent registered certificate of a Court's sale or to a subsequent deed unaccompanied by possession.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnuggur, in Appeal No. 9 of 1870, reversing the decree of the Subordinate Judge of Newassa.

Manmal sued to obtain possession of a field (survey No. 200) from Dashrath, under a certificate of sale granted to him by a Civil Court upon the 9th September 1867, and stated that he had obtained a money decree against one Krishnáji Anáji, and had attached and purchased at the Court's sale the field in question in satisfaction of that decree. The date of the attachment was the 8th of July 1867.

The defence of Dashrath mainly was that the field in dispute had been sold to him by Krishnáji for Rs. 50, under a deed of sale dated the 5th July 1867, and that he had been in possession since that date.

The Subordinate Judge decreed in favour of the plaintiff on the ground that the certificate of sale having been registered was entitled to a preference over the defendant's unregistered deed of sale, under Section 50 of Act XX. of

(z) See 4 Beng. L. R. A.C., 8 S.C. 12 Calc. W. R. Civ. R. 456 and see 9 Calc. W. R. Civ. R. 547

1872. 1866. In Appeal, the District Judge reversed the decree of
 MANMAL valad the first Court on the 16th August 1870. His reasons will
 SURATMAL appear from the following extract from his judgment :—
 v.
 DASHRATH “The issues framed by the Lower Court were :—(1) Which
 valad document is entitled to the preference, the certificate of sale,
 NA'RA'YAN. Exhibit No. 3, or the deed of sale, Exhibit No. 8? (2.) Was
 the deed of sale Exhibit No. 8 executed *bonâ fide* or not?

“My finding on the 1st Issue is that Exhibit No. 3 is entitled to preference over Exhibit No. 8, if they are conflicting documents. Exhibit No. 8 purports to be a deed of sale by Krishnáji, dated the 5th July 1867, while Exhibit No. 3 is a certificate of the plaintiff's purchase of Krishnáji's right in the land on a date subsequent to the 5th July 1867. I give full force to Exhibit No. 3, and the right which Krishnáji then had shall be awarded to the plaintiff. But Krishnáji then had no right in the land, for he had sold it and made it over to the purchaser, the defendant.

“My finding on the 2nd Issue is for the defendant. The execution of Exhibit No. 8 is proved by witnesses Nos. 21, 22, 23, 24 and 42; and the endorsement on the stamped paper of it shows that it was bought by Krishnáji on the date of its execution, viz., the 5th July 1867. The witnesses say that the purchase money of Rs. 50 was paid and that the land was then made over to the defendant, Dashrath.

“No doubt Krishnáji's motive in selling the land was that he knew that it was about to be attached by this plaintiff and it was attached on the 8th July 1867. But that does not invalidate the sale.”

The Appeal was argued before Westropp, C.J., and Melvill, J., on the 20th February 1871.

Ghanashám Nilkant, for the appellant :—The Lower Court held that the registered certificate of sale (No. 3) was not entitled to preference over the unregistered deed of sale (No. 8), whereas, under Act XX. of 1866, the certificate was entitled to such preference. Although the Lower Court had no doubt that Krishnáji's motive in selling the land was to

defeat Manmal's attachment, yet that Court did not hold the sale to be invalid. The Lower Court did not raise and determine the issue whether the alleged possession of Dashrath was obtained prior or subsequent to the attachment of the land in dispute by Manmal. The Lower Court held the deed of sale valid, although there was ample evidence on the record to show that it was not executed *bond fide*.

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Shántárám Náráyan for the respondent : The deed of sale (No. 8), though unregistered, was certainly good and valid as against Krishnáji, it being optional with the parties to register it or not, as the consideration was less than Rs. 100. There was, therefore, no right or title in Krishnáji to be conveyed by the subsequent certificate of sale.

Cur. adv. vult.

Westropp, C.J. :—Manmal, being the creditor of Krishnáji valad Anáji, sued him for the debt and recovered a decree in 1866, under which an attachment was laid upon a field on the 8th July 1867. The right, title and interest of Krishnaji in that field was sold under this attachment by public auction to Manmal for Rupees 25, and a certificate of sale (dated 9th September 1867) was given to him by the Munsif, which certificate was registered. A question as to the regularity of that registration has been raised on behalf of the defendant, but our opinion upon other points in the case renders it unnecessary that we should decide that point.

Krishnáji had, by private sale, sold the field and conveyed it to Dashrath, the defendant, on the 5th July 1867, that is to say, three days before the plaintiff's attachment was laid upon the field, and upwards of two months before the date of the certificate of sale to the plaintiff. The deed of sale (No. 8) to the defendant was not registered, but the finding of the District Judge amounts to this, that it was executed on the 5th of July 1867, and that the purchase money, Rupees 50, was then paid and the field made over to the defendant, Dashrath. By his memorandum of Special Appeal, clause (d), the plaintiff objects that the District Judge did not raise and determine the issue whether the

1872. possession of the respondent (defendant) was obtained prior
 MANMAL or subsequent to the attachment. But the defendant had
 valad put forward in express terms in his written statement by
 SURATMAL way of defence that the sale to him was on the 5th July
 v. 1867, and that the land had, since that time, been in his
 DASHRATH possession. It was open to the plaintiff, if he disputed that
 valad distinct allegation as to the time of the defendant's posses-
 NA'RA'YAN. sion, to have asked the District Judge to raise an issue upon
 the point. The plaintiff has not done so. It is, therefore,
 now too late to raise such a point, and the Judge has, we
 think, found the fact as to the time at which possession was
 given with sufficient clearness, and in conformity with the
 defendant's allegation in his written statement.

The main question in this case, as argued before us, was whether the unregistered deed of sale to the defendant, accompanied by immediate possession, ought to be preferred to the subsequent registered certificate of sale to the plaintiff unaccompanied by possession. The Calcutta cases *Selam Sheikh v. Baidonath Ghatak (a)* and *Narsing Porkaet v. Mussamat Bewah (b)* are distinct authorities in favour of an affirmative answer to that question. We concur in those decisions; and in the Special Appeal No. 313 of 1869, (*Bálárám Nemchand v. Appa Dulu, Hanmantá and another*), heard by my brothers Lloyd and Melvill and myself, we have this day stated our reasons for that concurrence.

The conclusion at which we have arrived on that question in favour of the defendant, renders it unnecessary for us to say any thing upon another point raised by the defendant, namely, whether the plaintiff is not prevented by the terms of the certificate of sale, which conveys to him only the right, title and interest of Krishnáji, from recovering the field, inasmuch as it was argued that the unregistered conveyance to the defendant (which it was optional with him to register or not, the consideration being under Rupees 100) being certainly good against Krishnáji, there was not any estate, right, or title in him to be conveyed by the sub-

(a) 3 Beng. L. R. A. J. 312, S. C. 12 Calc. W. R. Civ. R. 217.

(b) 5 Beng. L. R. Appx: 86.

sequent certificate of sale. For that proposition, the decision of Warden and Melvill, JJ., in Special Appeal No. 68 of 1870 was cited.

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A question was raised as to the right of Krishnáji to convey to the defendant, while the plaintiff's decree was pending against Krishnáji, and with a view to defeat it, but before attachment. *Wood v. Dixie* (c) decides that question in the affirmative, it having been ruled there that a sale of property for good consideration is not fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment creditor. There is neither proof nor allegation in this case that the defendant was privy to any such intention on the part of Krishnáji.

We affirm the decree of the District Judge with costs.

TO the same effect was the case of *Nágesh Bhat v. Balvantráv*, Special Appeal No. 113 of 1871, in which the following judgment was delivered on the same day by

Westropp C.J. :—In this case, the Judge found that the defendant, Krishnáji, had a mortgage of the lands in dispute from the defendant, Balvantráv, and had, under a decree in respect of interest due upon the mortgage, obtained possession of the lands. On the 28th September 1869, Balvantráv resigned, by an unregistered *ráznámá*, the same lands to the Collector with a view to the substitution of the name of Krishnáji in the Government books in lieu of the name of Balvantráv as tenant of those lands under Government. That substitution was made, and Krishnáji remained in possession as owner up to the time of the commencement of this suit by Nágesh Bhat.

On the 3rd December 1869, the defendant, Balvantráv, executed a deed of sale of the same lands for valuable consideration to the plaintiff, Nágesh Bhat, which was duly registered under Act XX. of 1866. Nágesh Bhat then instituted this suit against Balvantráv and Krishnáji to obtain possession of the lands and to redeem the original

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mortgage to Krishnáji. The Subordinate Judge made a decree in favour of the plaintiff for redemption and possession. The defendant, Krishnáji, appealed to the District Judge, who held that the transaction of the sale by Balvantráv to Krishnáji having been perfected by possession and by substitution of Krishnáji's name for that of Balvantráv in the Government books as tenant, the title of Krishnáji must prevail against the subsequent registered conveyance to Nágesh Bhat, the plaintiff. Nágesh Bhat has specially appealed against that decree to this Court, and contends that the *rázindámá*, whereby the defendant Balvantráv surrendered his interest to the Collector, being unregistered, ought to give way to the plaintiff's subsequent registered conveyance.

It is unnecessary for the Court to say whether or not a *rázindámá* addressed by a Government tenant to a Collector needs registration, in order to protect the new tenant, substituted with the assent of the late tenant for him by the Collector, from subsequent vendees of the original tenant.

The decisions of the High Court at Calcutta in the cases of *Selam Sheikh v. Baidonath Ghatak* (d) and *Narsing Porakaet v. Mussamat Bewah* (e) and those made here to-day in *Báláram Nemchand v. Appá valad Dulu* and *Manmall v. Dashrath* contain the principle on which this case must be decided, namely, that the title of Krishnáji, having been completed by possession, before Balvantráv attempted to confer upon Nágesh Bhat any lien upon or title to the lands, must prevail against the subsequent registered conveyance by Balvantráv to Nágesh Bhat. At the time Balvantráv executed that conveyance, he had not any estate in, or title to, the lands which he could convey to Nágesh Bhat.

Nágesh Bhat accordingly is neither entitled to be permitted to redeem the mortgage nor to obtain possession of the lands.

This Court, therefore, affirms the decree of the District Judge with costs.

(d) 3 Beng. L. R. A. J. 312, S. C. 12 Calc. W. R. Civ. R. 217.

(e) 5 Beng. L. R. Appx. 86.

[APPELLATE CRIMINAL JURISDICTION].

1872.
January 11.

REG V. LUKHMA' CHÁNGO.

Bombay Act VII. of 1867, Sec. 27—Music in private house—Police Prohibition.

Section 27 of Bombay Act VII. of 1867 does not empower the Police to prohibit the use of music in private houses.

ON the 6th October 1871, Kuvarji Kávasji, Magistrate F. P. at Tanna, convicted, under Sec. 29 of (Bombay) Act VII. of 1867, one Lukhmá Chángo of the offence of disobeying a proclamation, issued by the District Superintendent of Tanna, under the provisions of Section 27 of the same Act, and sentenced him (Lukhmá) to pay a fine of Rs. 5, or in default to suffer simple imprisonment for two days. The Magistrate observed in his finding :—

“ It appears from the evidence recorded in the case that the accused Lukhmá Chángo, having collected some 27 or 28 persons in his house, beat violently and incessantly native drums beyond the prescribed hours, in breach of the orders promulgated by the District Superintendent of Police, under Bombay Act VII. of 1867.”

On a review of the monthly criminal return of the Magistrate for October 1871, the High Court sent for the record and proceedings of the case to consider whether the conviction and sentence were legal.

The proceedings were reviewed in Court by Gibbs and Melvill, JJ. on the 11th January 1872.

PER CURIAM :—The Court reverses the conviction and sentence passed upon the said Lukhmá Chángo on the ground that Section 27 of Bombay Act VII. of 1867 does not empower the Police to prohibit the use of music in a private house.

Conviction and sentence reversed.

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January 20.

[ORIGINAL CRIMINAL JURISDICTION.]

In re JAMES HASTINGS.

Habeas corpus—Warrant—Omission to seal—Description of person to be captured—Signature—Crim. Proc. Code, Secs. 76 and 84.

A warrant issued under Section 76 of the Code of Criminal Procedure should be sealed, should describe the person to be apprehended under it with reasonable particularity so that there may be no difficulty in establishing his identity, and should be subscribed with the name and full official title of the Magistrate issuing it.

Where a warrant was defective in all the above particulars, the prisoner apprehended under it was released by the High Court.

ON the 19th of January 1872, *Anstey* moved for and obtained from Westropp, C.J., a writ of *habeas corpus* directed to the Chief Commissioner of Police, Bombay, and Henry John Brown, a Police Officer of the Bombay Police Force, commanding them to have before the High Court of Bombay, on the 20th of January, the body of James Hastings together with the day and cause of his being taken, &c.

The writ was granted upon affidavits that stated that James Hastings was a European born British subject, and that he resided in Bombay and there carried on business as a Civil Engineer; that he had been arrested on the morning of the 19th of January by Henry John Brown, a Police Officer of the Bombay Police Force, who asserted his right to hold the prisoner under a warrant, which he produced and showed to the deponent, and of which a copy was annexed to the affidavit. The warrant purported to be signed by F. A. Scott, who was said to be Deputy Commissioner of Nimar, in Central India. The affidavits also set out the grounds on account of which the warrant was said to be defective.

On this day F. H. Souter Esq., C.S.I., the Commissioner of Police, produced the body of James Hastings before the Court and the warrant under which he held the prisoner and undertook to put in a formal return to the writ. The following is an exact copy of the warrant the written portion of it being printed in italics :—

WARRANT OF ARREST.

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(Under Section 76 of Act XXV. of 1861.)

In re
JAMES
HASTINGS.To,—*The Commissioner of Police Bombay.*

Whereas *James Hastings* Stands charged with the offence of abetting the taking of gratification by a public servant in respect of an official act: You are hereby directed to apprehend the said *James Hastings* and to produce him before me.

HEREIN FAIL NOT.

JOHN A. SCOTT.

F. P. Magistrate and J. P.

Dated 16th January, 1872.


 Seal.

There was an endorsement on the warrant which ran thus—

Endorsement under Section 181, Act XXV. of 1861. .

If the said *James Hastings*

Shall give bail himself in the sum of 10,000 rupees

with 2 sureties in the sum of

Rs. 5,000 each.

to appear before me, on the

23rd day of January, 1872, he may be released.

JOHN A. SCOTT.

F. P. Magistrate and J. P.

Dated 16th January 1872.

The Honourable *J. S. White* (Advocate General) appeared for the Crown and submitted the validity of the warrant to the judgment of the Court.

Anstey for the prisoner :—The case before the Court is one of great hardship upon the prisoner, but if the warrant, upon which he has been apprehended, is correct in form, he must only submit. I contend that the warrant is invalid in form as well as in substance for the following reasons :—

I. It does not bear the seal of the person who issued it, though it purports to be issued under Section 76 of the Code

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of Criminal Procedure which requires all warrants to be sealed. The seal is an essential part of the warrant. It was necessary at Common law : 2 Inst. 52 ; 1 Hale 577 ; 2 Hawk., ch. 13, s. 21 ; 4 Burns's J. 393 ; 4 Blk. Com. 290 ; though a contrary opinion is supposed to have been once held : Willes Rep. 411. In the absence of a statutory provision, the omission of a seal will render the warrant void : *In re William Phipps (a)*. The Code of Civil Procedure has in fact merely adopted and re-enacted the provisions of the common law on the important subject. The American law is the same in this respect : Hind on *Habeas Corpus* p. 399.

II. It is bad as being a warrant which does not show where the prisoner, when apprehended, is to be taken or before whom. A warrant to take to jail generally is bad : *Rex v. Smith (b)*. The name of the person who issued the warrant is, it is true, given, but there is nothing more than the letters F. P. and J. P. to show what authority he had to issue a warrant against a European born British subject. It is admitted that this defect might be cured by the averments in the return : *Elderton's case (c)*, but in the present case it is impossible for Mr. Souter to supplement the warrant, as he cannot in fact know by whom it was issued.

III. All description of the person to be captured is omitted, for there is nothing in the warrant to show what James Hastings is meant by it. In *Rex v. Hood (d)* the omission of the Christian name of the person to be apprehended was held to vitiate the warrant. Blanks left in the warrant, as here, for the description of the person to be apprehended to be inserted by the officer executing it, cannot afterwards be filled up : 2 Hale P. C. 114 ; Foster 312.

IV. The offence must be described with reasonable certainty, not, as here, by a mere formal statement from which neither the Court nor the prisoner can collect any information. The warrant should have stated, for example, the name of the public servant said to have been bribed so that the prisoner

(a) 11 W. Rep. 730 (b) 2 Strange R. 934. (c) Ld. Raym R. 978.
 (d) 1 Mood. Cr. Cas. 281.

might be informed for what alleged act he was arrested : 1872.
Hale P. C. 584.

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HASTINGS.

The jealousy with which the Courts regard any want of formality in a warrant, is well exemplified in the case of *Howard v. Gossett* (e) (where all the authorities are referred to) —a case which was followed by the Exchequer Chamber in Ireland in the recent case of *Hodgens v. Poe* (f). As all intendments will be made against, and no intendment will be made in favour of, the legality of a warrant issued by an inferior Court, I submit that the warrant in the present case is altogether illegal, and that the prisoner is entitled to his discharge.

Sargent, J. :—In this case, I am of opinion that the prisoner is not in custody under a valid and legal warrant. The Commissioner of Police, to whom the writ of *habeas corpus* was directed, has brought up the body of the prisoner, and has produced before the Court the warrant under which, I must presume, he arrested the prisoner. That warrant is directed to the Commissioner of Police at Bombay, and runs as follows :—(His Lordship read the warrant and the endorsement as to bail upon it, and proceeded.)

The first objection that has been taken to that instrument is that it is without a seal. It was alleged that at common law a seal was essential to the validity of a warrant, and that would appear to be so according to the authorities. In the present case, however, the Magistrate, who issued this warrant, was not acting under the common law but under the provisions of a statute, namely, Act XXV. of 1861. The form of the warrant and its requisites are stated in Section 76 of that Act which enacts that “every warrant issued by a Magistrate shall be in writing and shall be signed and sealed by such Magistrate and shall be in the form given in the Appendix or to the like effect.” Now, having regard to the opinion that has, as I have said, been the opinion generally entertained by the Judges in England that a seal was essential at common law to the validity of a warrant, and that it is

(e) 14 L. J. Q. B. 367; S. C. 10 Q. B. 359.

(f) 2 Ir. Rep. C. L. 52; S. C. 16 W. Rep. 224.

1872.
In re
JAMES
HASTINGS.

expressly provided in the section I have just referred to, that a warrant shall be sealed, I should hesitate much before coming to the conclusion that a seal is not essential to the validity of a warrant issued under the Code of Criminal Procedure. The reason for requiring a seal seems to be that the attaching of a seal shows that the instrument, to which it is attached, has not been issued without due deliberation as well of course as to prove the authenticity of the instrument. Upon this ground alone, I should have had great difficulty in saying that the warrant in the present case is a valid one.

There is, however, another objection put forward to its validity to which I attach even greater force. The warrant authorizes the committal of James Hastings, without giving any description, whatever, as to what James Hastings is indicated thereby. The form of warrant given in the Appendix to the Code runs thus:—

“To _____ (*name and designation of the person or persons who are to execute the warrant*).

Whereas _____ of _____ stands charged with the offence of (*state the offence*): You are hereby directed to apprehend the said _____ and to produce him before me.

Herein fail not.

(*signature and seal*).”

The warrant in question runs thus: “Whereas James Hastings stands charged,” &c., without, in any way, indicating what James Hastings is meant thereby. Under a warrant in this form, if it were held to be a legal and valid warrant, the Commissioner of Police would be justified in arresting any one of that name. In *Hood's case* the Christian name only of the person arrested was omitted, but a full description was given of him. The warrant there was “To take the body of _____ Hood of the hamlet of Bemerton in the Parish of Fugglestone, St. Peter, in the same county by whatsoever name he may be called, or known, the son of Samuel Hood to answer,” &c., and in that case the Judges were unanimously of opinion that the warrant was bad. That case was decided comparatively recently by Lord

Tenterden and all the other Judges, with the exception of three, and the Judges who sat were unanimously of opinion that the warrant was bad, because it omitted the Christian name. It was said it should have assigned some reason for the omission and have given some distinguishing particular of George Hood. I think I am bound to follow the principle involved in that ruling, which is that a warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and this too, the more especially, as the form of warrant provided by the Code requires that his residence should be inserted. The issuing of general warrants is, it is well known, illegal, and this, though not properly speaking a general warrant, which means a warrant to apprehend all persons committing a particular offence or class of offences, is, however, of such a general nature as to justify the police in arresting any person of the name of James Hastings, whoever he may be, or wherever he may be found, the number of persons liable to be arrested under it being limited only by the limit to the number of persons bearing that name. The warrant in this case is, in my opinion, far more general than was the warrant in *Hood's case*, and I am, therefore, of opinion that it is bad.

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HASTINGS.

What I have said is sufficient to dispose of this return, but there were other objections taken to the validity of the warrant upon which I may say a few words. It was objected that the official character of the person signing the warrant did not appear upon the face of it; but I do not think that objection of itself can be supported. It is admitted that the omission might be supplied *aliunde*, and the warrant states that the person signing it was a Magistrate. There is nothing, however, to show where he is a Magistrate, or where the warrant was signed, and as Section 84 requires that when the person is arrested he shall (if bail is not taken) be forwarded to the Magistrate by whom the warrant was issued, it is plain that there is no certainty as to where the prisoner is to be sent, or before whom, as there may be more Magistrates than one, or even several, of the same

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name as the signing Magistrate. I think, therefore, that Section 84 shows that the place where the Magistrate signs should appear on the warrant. This view is borne out by the form given in the Act which leaves a space for the designation of the person before whom the prisoner is to be brought.

As to the objection taken to the offence not being described with sufficient particularity, I think it is not well-founded. The technical description of the offence is given and the form seems to contemplate that being sufficient.

For the reasons I have stated, I think it is my duty to hold that this is not a valid warrant. No good grounds have been shown for detaining the prisoner in custody. He must, therefore, be discharged.

[APPELLATE CRIMINAL JURISDICTION.]

February 7.

Miscellaneous Petition.

GANPRASA'D bin SOBHA'RA'MPetitioner.

Crim. Proc. Code Sections 308, 404—Judicial proceeding—Review.

An order under Section 308 of the Code of Criminal Procedure is a judicial proceeding within the meaning of Section 404 of that Code and is, therefore, open to review by the High Court under its extraordinary jurisdiction, when an error in law is committed.

Ashburner v. Keshav (a) on this point overruled, and *The Collector of Hoogly v. Tarak Nath Mukhopadhyaya* (b) followed.

THE following are the facts of the case :—

About three years ago, the petitioner, Ganprasád erected steps to his house in "Shukravár Peth" in the town of Sholápur, and paid to the Municipality of the place the sum of Rs. 130-8-0 for that and other purposes. On the 30th November 1870, the Municipality sought to remove the steps in consequence of which Ganprasád sued the Municipality and, on the 8th February 1871, obtained a decree enjoining the Municipality from removing the steps.

(a) 4 Bom. IL C. Rep. A.C.J. 150. (b) 7 Beng. Law Rep. 449.

On the 6th October 1871, F. Bosanquet, Magistrate of the District of Sholápur, issued an order directing Ganprasád, within a month from the date thereof, to remove the steps or to show cause why the said order should not be enforced. On the 24th October 1871, Ganprasád appeared to show cause and produced the decree of the 8th February 1871 in support of his claim to retain the steps. The cause shown, however, was disallowed on the 25th October 1871.

1872.

GANPRASÁD
bin
SOBHARÁM.

Ganprasád thereon petitioned the Magistrate on the 30th October 1871, and prayed that as he had instituted a fresh suit to prove his right to retain his steps, the order of the 6th October 1871 should not be enforced till the termination of that suit. The Magistrate, however, rejected that petition on the 30th October 1871.

On the 31st October, Ganprasád obtained from the Court of the Assistant Judge, in which his suit against the Magistrate had been pending, an injunction directed to that officer to stay criminal or any other proceedings against Ganprasád in the matter of the steps.

Notwithstanding this injunction, the Magistrate, on the 1st November 1871, issued an order to Ganprasád, stating that the Civil Court had no power to entertain the suit and that he would enforce the previous order, viz., the order of the 6th October 1871.

Ganprasád thereon presented a petition to the High Court, and prayed that the proceedings of the Magistrate might be sent for, and his illegal and arbitrary action restrained.

On the 9th November 1871, the Court (Melvill and Kemball, JJ.) received the petition and referred it to the Magistrate of Broach, with a direction to him to report in detail on the allegations contained in the petition, and to stay all proceedings in connection with the case. On the receipt of the report, the Court (Gibbs and Melvill, JJ.) referred the case, on the 19th December 1871, to the Full Bench under the following order :—

1872. "We refer to the Full Bench the question whether the proceedings of a Magistrate, made under Section 308 and following Sections of the Code of Criminal Procedure, are a judicial proceeding within the meaning of Section 404 of the Code.

CANPRAAS'D
bin
SOBHAR'A'M.

"This question was decided in the negative in *Ashburner v. Keshav* (c), but it seems to us desirable that it should be reconsidered. The Calcutta High Court has adopted a different view: *Collector of Hooghly v. Tarak Nath Mukhopadhyaya* (d).

"We may state that in the case before us, the Magistrate of a District ordered the removal of an obstruction from a thoroughfare. The person, to whom the order was issued, showed cause against the order, but the cause being disallowed, the Magistrate has proceeded to carry his order into execution, and has directed criminal proceedings to be instituted against the person aforesaid. If the question referred to the Full Bench be decided in the affirmative, it is our intention to call for the proceedings of the Magistrate, in order to determine whether the cause shown was such that the Magistrate committed an error in law in disallowing it."

On the 20th December 1871, the petition was argued before Westropp, C.J., Lloyd, Melvill, and Kemball, JJ.

Shántarām Nārāyan, for the petitioner:—Long before the date of the decision in *Ashburner v. Keshav* (28th March 1867) this Court had held in several cases that a Magistrate's order under Section 308 of Act XXV. of 1861 was a judicial proceeding within the meaning of Section 404 of that Act. *In Re Bāpu Chintāman*, the High Court (Couch and Tucker, JJ.) sent for the proceedings of the Magistrate of Ratnagiri, under Section 404 of the Criminal Procedure Code, and reversed his order made under Section 308 (6th April 1864). *In Re Karsandās Bechar and another*, the High Court (Westropp and Tucker, JJ.) entertained an application, under the extraordinary jurisdiction, against an order of the Ma-

(c) 4 Bom. H. C. Rep. A. C. J. 150.

(d) 7 Beng. Law Rep. 449, see p. 482.

gistrate of Broach prohibiting the burning and burying of dead bodies at a certain place and directing their disposal at another place four miles off. The application, however, was rejected on the merits. Moreover, what the late Chief Justice said in *Ashburner v. Keshav*, that an order under Section 308 was not a judicial proceeding, was merely an *obiter dictum*, and not a deliberate decision of the Court. The question came before the Court only incidently and did not and could not have received full consideration. [Westropp, C.J., referred to *Kemp v. Neville (e)*].

WESTROPP, C.J. :—We are of opinion that the view taken by the Calcutta Bench in the case referred to in the order of reference is correct, and that so much of the decision in *Ashburner v. Keshav* as declares that a Magistrate's order made under Chapter 20 of the Code of Criminal Procedure is not a judicial proceeding, cannot be sustained.

Proceedings under Chapter 20 were treated as judicial proceedings in several cases previous to that of *Ashburner v. Keshav*, and were reviewed by this Court under Section 404. The provision in Section 308, which requires the Magistrate to issue a notice to the person concerned to show cause why the order should not be enforced, is in itself sufficient to show that the order is to be regarded as a judicial proceeding.

The question referred by the Division Bench must be answered in the affirmative. It will be for the Division Bench to call for the record and proceedings in the case, and the Magistrate will have an opportunity, if he pleases, of instructing counsel to appear in support of the legality of his proceedings.

The Division Bench, on receipt of the Magistrate's proceedings in the case, heard the petition on the 1st February 1872, when

Shántárdam Nárdyan, appeared for the petitioner.

There was no appearance in support of the Magistrate's order.

1872. The Court (MELVILL and KEMBALL, JJ.) took time to consider its judgment and, on the 7th of February, reversed the order of the District Magistrate, which it considered to be arbitrary and unjust, and referred to the remarks of the Court in the case of *Reg v. Dalsukráam Haribháí* (f).

Order reviewed.

[APPELLATE CRIMINAL JURISDICTION.]

Feb. 8.

REG. v. VAKTÁ' valad LAKHU.

Pound-keeper—Act I. of 1871, Sections 6 and 27.

Where a Magistrate convicted, under Section 27 of Act I. of 1871, a person who was not himself a pound-keeper, but was merely entertained by the Police Pátíl, who was *ex-officio* pound-keeper under Section 6 of the Act.

The High Court annulled the conviction and sentence passed upon the accused.

THIS case was referred for the orders of the High Court by A. A. Borradaile, Magistrate of the District of Ahmadabad, who made the following observations :—

“Under the provisions of Section 434 of the Code of Criminal Procedure, I have the honor to forward, for the orders of the Honorable Judges, the papers and proceedings of the Second Class Subordinate Magistrate of Veerangáon, Azam Prágji Anandráam, in the case of *Reg. v. Vaktá Lakhu*, convicted and sentenced, under Section 27 of Act I. of 1871, to pay a fine of one Rupee.

“The word ‘Pound-keeper’, as used in Section 27, under which the accused is convicted, is defined in Section 6 which contains special provision in regard to Pound-keepers in the Bombay Presidency.

“The accused in this case is not a Police Pátíl, but a person merely entertained by the Police Pátíl of Veerungáom, who is *ex-officio* the Pound-keeper, to look after the impounded cattle and to water and feed them.

(f) 2 Bom. H. C. Rep. 384.

"I am, therefore, of opinion that the proceedings of the Subordinate Magistrate are illegal."

1872.

On the 8th February 1872, the proceedings were considered by Melvill and Kemball, JJ.

REG
v.
VAKTA'
valad
LAKHU.

PER CURIAM :—The proceedings of the Subordinate Magistrate of Veeramgaon in the case of the said Vaktá Lakhu must be annulled, and the fine, if levied, be returned.

Proceedings annulled.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. DHORI KULLAN.

Feb. 8.

*Obstructing Public Servant—Refusal of Cart to a Government officer—
Ind. Pen. Code Sec. 186.*

The refusal of a cart-owner to give his cart on hire to a Government officer does not constitute the offence of obstructing a public servant in the discharge of his public functions within the meaning of Sec. 186 of the Indian Penal Code.

THE accused was the owner of a cart. He refused to give it on hire to a Government officer who applied for it. He was, therefore, prosecuted before the first class Subordinate Magistrate of Dholká, in the District of Ahmadabad. The Magistrate convicted him of the offence of obstructing a public servant in the discharge of his public functions, and, under Section 186 of the Penal Code, sentenced him to pay a fine of Rs. 4, or in default, to suffer simple imprisonment for seven days.

The Magistrate of the District of Ahmadabad (A. A. Borradaile) considered the conviction of, and sentence passed upon, the accused to be illegal, and submitted the proceedings for the consideration and orders of the High Court, under Section 434 of the Code of the Criminal Procedure.

The proceedings were considered in Court by Melvill and Kemball, JJ., on the 8th February 1872.

PER CURIAM :—The Court orders that the conviction and sentence passed upon Dhori Kullan be reversed and that the fine, if levied, be returned.

Conviction and sentence reversed.

1872.
Feb. 29.

[APPELLATE CRIMINAL JURISDICTION.]

REG. V. SADU DA'DA'BHA'1.

Smuggled Opium—Appeal from decision of Magistrate of District—Regulation XXI. of 1827, Section 7—Crim. Proc. Code, Sections 21 and 409.

Although the effect of Section 21 of the Code of Criminal Procedure is to give exclusive original jurisdiction to the Magistrate of the District in the trial of cases under Section 7 of Regulation XXI. of 1827 for abetting the smuggling of opium, that Section (21) does not exclude the appellate jurisdiction vested in the Court of Session by Section 409 of the Code.

THIS was a reference made by A. A. Borradaile, District Magistrate of Ahmadabad, for the opinion of the Court. He stated that he had decided a case of keeping smuggled opium, under Section 4 of Regulation XXI. of 1827, and that the Sessions Judge had entertained an appeal against his decision. He added that the whole tenor of the High Court's decision in the case of *Reg. v. Lakhū Sakru (a)* was to affirm that the Criminal Judge of 1827 was not represented by the Sessions Judge of the present time. He, therefore, requested the opinion of the High Court on the question of appeal.

The reference was considered by Gibbs and Melvill, JJ.

PER CURIAM:—The Court is of opinion that, although the effect of Section 21 of the Code of Criminal Procedure is (as already decided by this Court) to give exclusive original jurisdiction to the Magistrate of the District in the trial of cases under Section 7 of Regulation XXI. of 1827, yet it does not exclude the appellate jurisdiction vested in the Court of Session by Section 409 of the Code.

(a) 8 Bom. H. C. Rep. Cr. Ca. 118.

[APPELLATE CRIMINAL JURISDICTION.]

1872.
May 1.

REG. v. PA'PIDIO MUTHDO.

Full-Power Magistrate—Reference of case by Magistrate F. P. to Subordinate Magistrate.

A Full-Power Magistrate has no authority to refer for disposal to a Subordinate Magistrate a complaint made originally to such Full-Power Magistrate.

THE prisoner was tried and convicted by the second class Subordinate Magistrate of Walore, in the District of Súrat, of the offence of mischief, under Section 426 of the Penal Code, and was, on the 3rd May 1870, sentenced to pay a fine of Rs. 4, or in default, to suffer simple imprisonment for 7 days.

The Magistrate of the District of Surat (T. C. Hope), considering the proceedings of the Sub-Magistrate illegal, referred them, under Sec. 434 of the Code of Criminal Procedure, for the consideration and orders of the High Court. He observed—

“It would appear that Mr. F. Birkbeck, a Magistrate F. P., received the petition, and without, in the first instance, administering solemn affirmation to the presenter, referred it to the Chief Constable of Walore, desiring him to make a preliminary inquiry, and to commit the case to a Subordinate Magistrate, should an offence appear to have been committed. I consider the conviction and sentence illegal, because Mr. Birkbeck had no authority to refer the petition to a Subordinate Magistrate for disposal.”

The proceedings were considered in Court by Lloyd and Melvill, JJ.

PER CURIAM :—The Court concurs with the District Magistrate that the reference by the F. P. Magistrate to a Subordinate Magistrate was illegal, and orders that the conviction and sentence passed upon Pápidio Muthdo be reversed, and the fine, if paid, be restored.

Conviction and sentence reversed.

1872.
REG.
v.
PA'PIDIO
MUTHDO.

NOTE.—A similar decision was arrived at in the case of *Reg v. Fakiráppá bin Ningáppá*, decided on the 17th September 1869, by Warden and Lloyd, JJ.

The facts were these: The prisoner was convicted by the 1st-Class Sub-Magistrate of Raneebednore, in the District of Dharwar, of disobedience to the order of a public servant and was, under Sec. 188 of the Penal Code, sentenced to pay a fine of Rs. 5 with the alternative of undergoing simple imprisonment for 7 days. Fakiráppá paid the fine. The case was first sent up by the Fouzdar of Kurujghee to Mr. Middleton, Magistrate F. P., who, however, was not a Magistrate in charge of a District, or of a Division of a District. Instead of trying the case himself, Mr. Middleton referred it to the 1st-Class Sub-Magistrate who, accordingly, tried it. On the report of the District Magistrate (E. P. Robertson) that the Magistrate F. P. was not competent to make the reference to the Sub-Magistrate under the provisions of Section 273 of the Criminal Procedure Code, the High Court sent for the proceedings for a review and passed the following order:—

PER CURIAM:—The Court, concurring with the District Magistrate, annuls the conviction and sentence, as the Magistrate F. P., Mr. Middleton, had no power to refer the case to the 1st Class Sub-Magistrate for trial, and directs that the fine, if paid, be refunded.

Conviction and sentence reversed.

[APPELLATE CRIMINAL JURISDICTION.]

1872.
May 23.

REG. V. SUBHA'NA' bin GANT.

Retrial—Power of District Magistrate to direct retrial—Crim. Proc. Code, Sec. 435.

Where a Sub-Magistrate discharges a person accused of an offence not being an offence specified in the seventh column of the schedule to the Criminal Procedure Code as triable by the Court of Session only, or by the Court of Session or Magistrate of the District, the District Magistrate has no power to direct a retrial under the provisions of Section 435 of the Code of Criminal Procedure.

ON the 13th December 1871, the accused Subhúná was tried by Vináyak Ganesh, 2nd Class Subordinate Magistrate of Salsette, in the Tanna District, on a charge of voluntarily causing hurt, under Section 323 of the Penal Code, and was discharged under Section 250 of the Criminal Procedure Code, there being no satisfactory evidence against him.

The Magistrate of the District (W. A. Robertson), considering the discharge improper, submitted the proceedings of the Sub-Magistrate for the orders of the High Court, and requested to know whether in such a case the District Magistrate could order a retrial under the provisions of Section 435 of the Code of Criminal Procedure.

The question was considered by Bayley and Kemball, JJ., on the 23rd May 1872.

PER CURIAM :—The offence of voluntarily causing hurt not being an offence specified in the seventh column of the schedule to the Criminal Procedure Code, as triable by the Court of Session only, or by Court of Session or Magistrate of the District, Section 435 is inapplicable so as to enable the District Magistrate to direct a retrial.

1872.
May 23.

[APPELLATE CRIMINAL JURISDICTION.]

REG. V. VENKU NARSA'.

Acquittal of accused by Magistrate—Power of Sessions Court to direct committal—Crim. Proc. Code, Secs. 255 and 435.

After an accused person has been acquitted under Sec. 255 of the Code of Criminal Procedure, it is not competent to the Session Judge to interfere under Sec. 435 of the same Act.

THE accused was prosecuted before G. B. Reid, Magistrate F. P., in the District of Púna, by a woman named Bhágu, on a charge of defamation under Section 500 of the Penal Code. The Magistrate F. P., after taking evidence for the prosecution and after framing and reading the charge to the accused, recorded a verdict of acquittal, on the 1st November 1871, under the provisions of Section 255 of the Criminal Procedure Code.

On the 24th January 1872, the Sessions Judge, R. H. Pinhey, of Puna, on the application of the complainant, Bhágu, set aside the above order of acquittal, and, under the provisions of Section 435 of the Code of Criminal Procedure, directed the Magistrate F. P. to commit the accused for trial before the Court of Session.

The case was submitted for the consideration and orders of the High Court by J. E. Oliphant, District Magistrate of Puna, with the following remarks :—

“It will be seen that the order set aside by the Sessions Judge of Puna was an order of acquittal passed by a F. P. Magistrate, under Section 255 of the Criminal Procedure Code, after preparing a formal charge against the accused Venku Narsá.

“Section 435 of the Criminal Procedure Code, as amended by Act VIII. of 1869, empowers the Court of Session in cases triable by the Court of Session only, or Court of Session or Magistrate of the District, to order the commitment of any person who may have been *discharged* by any Magistrate. The word ‘discharged’ seems to refer only to cases disposed of under Sections 225 and 250 of the Criminal Procedure Code.

"In the present case, the order being under Section 255, the Sessions Judge is, in my humble opinion, not authorized by law to set it aside and order commitment under Section 435, because the accused person was acquitted after a charge had been prepared."

1872.

REG.

v.
VENKU
NARSA'.

The proceedings were considered in Court by Bayley and Kemball, JJ., on the 23rd May 1872.

PER CURIAM :—The Court annuls the order of the Session Judge, directing the committal of the said Venku Narsá to the Session Court, for the reason that the said accused having been acquitted after trial, it was not competent to the Session Judge to interfere under Section 435 of the Code of Criminal Procedure.

Order annulled.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. JETHYA' valad VESTYA'.

May 23.

Breach of contract of service—Act XIII. of 1859, Sec. 2.

A labourer agreed to serve in consideration of money due from him on account of previous debts. He served for three months only, and then quitted service in violation of the agreement. He was prosecuted and convicted of breach of contract of service under Act XIII. of 1859.

Held that he was not liable to be dealt with criminally, because there was no fraudulent breach of contract within the meaning of Act XIII. of 1859, and because, further, *no money in advance was received*, the consideration for the agreement to serve being an old debt.

THE accused was convicted by G. W. Anderson, Magistrate, F. P., in the Khandesh District, of the offence of committing breach of contract of service under Section 2 of Act XIII. of 1859, and was, on the 20th February 1872, sentenced to suffer rigorous imprisonment for two months.

The accused owed Rs. 195 to one Náná Prayág on account of former debts. On the 24th August 1871, he passed to Náná a writing, in which he agreed to serve him (Náná) for ninety-seven months and a half, in consideration of this sum of Rs. 195. Accordingly, Jethyá entered Náná's service, but

1872. left it after three months. On this, Náná prosecuted him before the Magistrate F. P., who found him guilty under Act XIII. of 1859.

REG.
v.
JETHYA
valad
VESTYA'.

On a review of the monthly Criminal return, the High Court sent for the Magistrate's proceedings. On their receipt, the case was considered in Court by Bayley and Kembball, JJ. on the 23rd May 1872. The Court passed the following order :—

It is clear that there was no "fraudulent breach of contract," within the meaning of Act XIII. of 1859, so as to render Jethyá liable to be dealt with criminally; and the way in which the case has been dealt with reflects little credit on the Magistrate, F. P. It is patent on the face of the proceedings that *no money in advance was received*, the consideration for the agreement to work for the complainant being an old debt, so that nothing but great carelessness in reading the Act in question could have allowed the Magistrate to deal with Jethyá as a criminal.

Jethyá has suffered the full term of this improper sentence. The Honorable the Judges of the High Court are, therefore, powerless to afford him any remedy.

[APPELLATE CRIMINAL JURISDICTION.]

May 23. REG. v. ANVARKHA'N valad GULKHA'N and another.

*House-breaking in order to commit theft—Theft—Compound offence—
Separate sentence—Limit of punishment—Ind. Pen. Code,
Secs. 380 and 457—*

It is competent to a Magistrate to pass a separate sentence in respect of each of the two charges, of house-breaking in order to commit theft, and of theft in a human dwelling, of which a prisoner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided, further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentences.

THE accused were convicted by E. T. Richardson, Magistrate F. P. at Púna, of two offences, viz., of house-

breaking in order to commit theft, and of theft in a dwelling house and, on the 22nd June 1871, were sentenced, each, to undergo rigorous imprisonment for two years (being one year for each offence) under Sections 457 and 380 of the Penal Code.

1872.
REG.
".
ANVARKHÂN
valad
GULKHÂN.

On appeal, the Session Judge of Puna (R. H. Pinhey) considered the sentences passed by the Magistrate, F. P., to be illegal and reduced them to one year. His reasons will appear from the following extract from his finding recorded on the 2nd August 1871 :—

“ Notwithstanding a great deal of illegal evidence (hearsay) that has been recorded in this case, there can, I think, be no doubt of the guilt of the appellant, but the F. P. Magistrate was in error in sentencing the appellant for two distinct offences. House-breaking in order to commit theft, and theft committed by means of that house-breaking, are parts of one offence, and therefore, under the provision of Section 71 of the Indian Penal Code, not punishable separately (*Reg v. Bhiká Putzá*, Bombay High Court, 4th November 1863).

“ Under the provisions of Section 419 of the Code of Criminal Procedure, I alter the sentence recorded against the appellant by the F. P. Magistrate by reversing the sentence of one year's rigorous imprisonment passed on the appellant Anvarkhán Gulkhán for theft.”

On the 3rd October 1871, the Magistrate of the District of Puna (J. E. Oliphant), at the request of Mr. Richardson, submitted the proceedings for the consideration and orders of the High Court. Mr. Richardson's reasons for passing two distinct sentences upon the two offences held proved by him, will appear from the following extract from his letter :—

“ I have the honour, with deference to the Session Judge's remarks, * * * to point out that the following circulars, decisions, and rulings of Her Majesty's High Court Judges, overrule the opinion held in the case referred to by the Session Judge of Puna.

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| 1872.
<hr/> REG.
v.
ANVARKHAN
valad
GULKHAN. | (1) Circular from Her Majesty's High Court, No. 1348, dated the 4th November 1863.
(2) Do. do. No. 449, dated the 26th March 1866.
(3) The decision in <i>Reg v. Genu bin Aku</i> , Volume V. page 83, of reported cases, dated 16th September 1868. |
|---|--|

(4) Criminal rulings of Her Majesty's Judges, dated 16th August 1869, in *Reg. v. Ramchunder Jairam*.

"From the circular and decision above quoted (1 and 3) it would appear that the passing of separate sentences upon conviction of house-breaking in order to the committing of theft, and of theft, is not in itself illegal, as the sentences passed by me taken together, in each of these cases, were not beyond my powers.

* * * * *

"The Session Judge does not in the least doubt the guilt of the appellants, for, in both cases he says, 'there can, I think, be no doubt of the guilt of the appellants,' and as the Session Judge has reduced the sentences, not from their being too severe, but from an impression that I was wrong in passing sentences upon each of the heads of charge, I would beg respectfully, under the provisions of Section 404 of the Criminal Procedure Code, to suggest that the cases be referred to Her Majesty's High Court, in order that the Session Judge's order may be reversed and the original sentences confirmed."

The case, coming before a Division Bench of the High Court (Kemball and West, JJ.), on the 25th October 1871, was referred by it to the Full Bench for disposal with the following observations :—

"We refer to the Full Bench the question whether a person charged with a complex criminal act such as house-breaking with intent to commit theft, and theft, may be tried and convicted and punished for each of these offences as to which the Penal Code has separate and distinct provisions. Two cases have been referred from the districts of Puna and Nasik, respectively, for the interference of this Court on the

ground that conviction and punishment for each of the several offences are illegal. This view is supported by the rulings of this Court, in *Reg. v. Bhiká Putzá*, 4th November 1863, *Reg. v. Arjun (a)* and *Reg. v. Tukýá Bhikyá*, 2nd March 1864; but, on the other hand, there are the decisions also of this Court in *Reg. v. Genu (b)* and criminal rulings of the 16th August 1869, opposed though these are to various rulings of the Bengal High Court.

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"The decisions seem confused and contradictory, and we think that the whole question requires fuller consideration, both as to the soundness of the principle of annexing a single *criminal* intent to successive acts so as to constitute several offences, and as to the propriety, when the Sessions Court convicts of the greater of two partially coincident offences, of suspending the inquiry upon the other."

The proceedings were, accordingly, considered in Court by Westropp, C.J., Gibbs, Lloyd and Kembball, JJ., on the 25th January 1872.

Cur. adv. vult.

23rd May. PER CURIAM :—The Court is of opinion that it was competent for the Magistrate F. P. to pass a sentence on each of the two charges, viz., of house-breaking in order to the committing of an offence punishable with imprisonment, and of theft in a building used as a human dwelling, provided that the aggregate amount of punishment awarded on the two charges did not exceed that which the case warrants for the greater of the two offences of which the two accused persons have been respectively convicted, and provided also that such aggregate punishment did not exceed the jurisdiction of the Court which has convicted the accused. Tried by these tests, the sentences passed by Mr. Richardson, the Magistrate, F. P., in this case of the Queen v. Anvarkhán valad Gulkhán, and Bhutá bin Sabláji, were lawful; inasmuch as the aggregate of the punishments awarded to each prisoner neither exceeded the punishment, which by law might be allotted to the graver of the two offences, nor the

(a) 1 Bom. H. C. Rep. 87 (b) 5 Bom. H. C. Rep. Cr. Ca. 83.

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 1873. The Court, therefore, reverses the orders of the Session Judge.
 1874. and restores the sentences passed by the Magistrate, F. P.
 1875. *Order of the Senate, J. J. J. J. J.*

[ORIGINAL CIVIL JURISDICTION.]

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Feb. 17.*Appeal Suit No. 171.*ARDESAR HORMASJI WA'DIA' *Appellant.*

THE SECRETARY OF STATE FOR INDIA IN

COUNCIL *Respondent.**Appointment of third arbitrator under Sec. 12 of Act VI., 1857—Umpire
—Award—Nullity—Notice to attend—Irregularity—Misconduct—
Waiver.*

Where one of two arbitrators, appointed under Sec. 10 of Act VI. of 1857, by letter and also verbally authorized his co-arbitrator to appoint a certain person as third arbitrator, and the co-arbitrator wrote to the proposed third arbitrator informing him that he had been so appointed :—

Seem that there was a good appointment "by writing" of the third arbitrator within the meaning of Sec. 12 of Act VI. of 1857.

Where a third arbitrator appointed under Sec. 12 of Act VI. of 1857, considering that his services were required merely as an umpire, though he had due notice of the first meeting, neglected to attend that or any subsequent meetings of the arbitrators and took no part in the making of the award :—

It was held that such non-attendance of the third arbitrator did not render the award a nullity, but was only a ground for setting it aside on the ground of irregularity.

Where an officer, appointed under Act VI. of 1857 to conduct arbitration proceedings on behalf of Government, attended the first two meetings of the arbitrators and did not object to two of the arbitrators proceeding with the reference in the absence of the third arbitrator, and did not attend the subsequent meetings of the arbitrators :—

It was held that Government had thereby waived their right to insist on the non-attendance of the third arbitrator as a ground for setting aside the award.

THIS was an appeal from the judgment of Bayley, J., made in favour of the defendant on the 2nd day of December 1870.

As Act VI. of 1857 has, since the case first came before the Court, been repealed by Act X. of 1870, it has only been deemed necessary to publish the judgment of the Appellate Court from which the facts of the case and the arguments of Counsel will sufficiently appear.

The appeal was argued before WESTRÖPP, C.J., and GIBBS, J.

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McCulloch and Latham for the appellant.

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The Honourable A. R. Scoble (Acting Advocate General),
Mayhew and Macpherson for the respondent.

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17th February 1872. WESTROFF, C.J. :—This is an appeal from the Third Division Court. The plaint in the suit was filed by Ardesar Hormasji Wádiá upon an award to recover Rs. 58,278 with interest. The award purported to be made by a majority of arbitrators appointed in accordance with Act VI. of 1857, "an Act for the acquisition of land for public purposes," and directed the defendant to pay to the plaintiff the sum already mentioned, with interest at six per cent. per annum, as compensation for a piece of land (containing 13,987 square yards) situate at Kurla in the Island and Táluká of Salsette and Collectorate of Tháná, which, by notification of the Acting Chief Secretary to the Government of Bombay, dated the 27th May 1868, published in the *Government Gazette* of the following day under the provisions of that Act, was declared to be "required for a public purpose, namely, for Railway purposes." The plaint states that possession was taken of the land by the defendant on the 27th May 1868.

The defendant, the Secretary of State for India, has filed a written statement by way of defence.

The issues settled in the Division Court were :—

1. Whether any valid award was made in accordance with the provisions of Act VI. of 1857? This the learned Judge found in the negative.

2. Whether Mr. Campbell and Mr. Addis, before they entered upon the matter referred to them, duly by writing nominated and appointed Andrew Hay to act with them as arbitrator pursuant to Sec. XII. of the said Act? Upon this issue the learned Judge did not consider it necessary to come to any finding.

3. Whether the defendant, by his agent, had notice of any meetings of the arbitrators subsequent to the first two meetings? This was found in the negative.

4. Whether any award was made by a majority of the arbitrators according to the provisions of the said Act? This was found in the negative.

5. Whether the defendant is entitled to raise the 2nd, 3rd or 4th issues after the lapse of three months from the time of the making of the award? This, so far as it concerned the right to raise the 4th issue, was found in the negative. As to the right to raise the 2nd and 3rd issues, there was not any finding.

6. Whether the irregularities alleged in the 2nd, 3rd and 4th issues were waived by the defendant? So far as this related to the 3rd and 4th issues, it was found in the negative. So far as it related to the 2nd issue, there was not any finding.

7. Whether the plaintiff is entitled to recover the amount claimed or any part thereof? This was found in the negative. And the learned Judge accordingly made a decree for the defendant with costs.

From that decree the plaintiff has appealed, alleging substantially that the learned Judge ought to have found all of the above issues, upon which there were findings, in the opposite way to that in which he did find them, and that all of the issues, on which there were not findings, ought to have been found in favour of the plaintiff.

The appeal has been heard by my brother Gibbs and myself.

The facts of the case may be taken to be as follows :—

Government, having occasion, for railway purposes, to acquire land at Kurla, belonging to the plaintiff, issued, on the 27th of May 1868, the usual notification, under Act VI. of 1857, stating that the land was required for a public purpose. Act VI. of 1857 has been repealed by Act X. of 1870, but, having been the law at the time of the transactions, the subject of this suit, is the Act applicable to this case.

The parties having differed as to the amount of compensation, a reference to arbitration, as provided for in Sec. 10, became necessary.

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The Acting Collector of Tháná, by letter of the 19th June 1868 addressed to the plaintiff, appointed "the Mám-latdár of the Salsette Taluka" as the officer under Act VI. of 1857 to take steps for the acquisition of the land. The Mám-latdár, by writing, appointed Mr. Addis, a Civil Engineer, to be arbitrator on behalf of Government. The plaintiff at first appointed Mr. McClelland to be his arbitrator, but he, being about to leave Bombay, declined the office, and thereupon the plaintiff appointed, by writing, Mr. John Campbell to be his arbitrator. The regularity of those appointments has not been questioned.

By a letter in the Maráthi language, dated 29th October 1868, from Náráyan Rávji, Mám-latdár of the Táluká Salsette (who describes himself as "the officer appointed under Act VI. of 1857") to Mr. McClelland, the taking of the land, and the necessity "that the price thereof may be fixed by arbitration under the Act," are (*inter alia*) mentioned, and also the fact that Mr. Addis, "Local Fund Engineer of the Zillá of Tháná," had been appointed as arbitrator for Government. Between the date of that letter and the 4th December 1868, a new Mám-latdár of the Táluká of Salsette seems to have been appointed, for, under the last-mentioned date, we find that Trimbak Bápuji, who describes himself as "Mám-latdár of the Táluká Salsette," and as "the officer appointed under Act VI. of 1857," wrote a letter in Maráthi to the plaintiff, referring to the taking of the land, and giving him notice that "the matter of fixing its price under the Act will come on before the arbitrators on the 16th day of the month of December in the year 1868," and that the meeting of the arbitrators was to be at the office of Mr. Addis at Tháná, which meeting, however, did not then take place. The postscript of that letter was as follows:—"A sealed letter to the address of Mr. John Campbell, your arbitrator, is sent to you. Be so good as to have the same conveyed to him."

The next step to have been taken, after the appointment of Mr. Campbell and Mr. Addis, was that they should, under the 12th section of the Act, before they entered upon the

matter referred to them, nominate and appoint "by writing" a third person to act with them as arbitrator. What they did was as follows:—Mr. Addis wrote a letter to Mr. Campbell, by which, *and afterwards also verbally*, he authorized Mr. Campbell to appoint Mr. Hay to be the third arbitrator, and thereupon Mr. Campbell wrote to Mr. Hay, informing him that he was so appointed. Neither of these letters has been produced. The former would seem to have been lost or mislaid. As to the latter, it appears to have been destroyed by Mr. Hay, who states in his evidence, taken *de bene esse*, that after the arbitration was concluded, he destroyed the correspondence he had on the subject, including Mr. Campbell's letter.

Looking to the evidence of Mr. Campbell and Mr. Hay, we have come to the conclusion that Mr. Campbell, in his letter to Mr. Hay, informed the latter that he was appointed "third arbitrator and umpire." Both of these gentlemen are under the impression that this was so, and their evidence stands uncontradicted. On the 2nd February (Tuesday) 1869, Mr. Campbell again wrote to Mr. Hay thus: "Can you meet at my office on Thursday next" (that would have been the 4th February) "to commence arbitration on cost of land at Kurlá, belonging to Ardesar Hormasji Wádíá, taken up by Government? Please let me know at once. If you can do so, I will write Mr. Ardesar and Addis to be ready also for that time." Mr. Hay replied on the same day as follows:—"I understood I was to be umpire in the matter, and not an arbitrator; but the fact is I have heard nothing particular on the subject. Thursday would not suit me. Either Friday or Monday." To which on the same day Mr. Campbell replied:—"You are quite right in your understanding that *you are to be umpire (or third arbitrator, as it is one and the same thing)* in the case I mentioned to you, but, as such, I presume it is requisite that you should attend the arbitration meetings to be in a position to decide, in case we (i.e. Mr. Addis and myself) may happen to differ. Do I understand you that Friday afternoon at 3 P.M. will suit you to meet at my office in this

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matter? Kindly let me know that I may be enabled to inform others connected with the matter in due time." The Friday (5th February) named in that letter would seem not to have suited the parties, and no meeting appears to have been held on that day. But, upon that 5th February, Mr. Campbell wrote to Mr. Hay thus:—"Next Thursday morning at 11 A.M., Mr. Addis and I have agreed to hold our first arbitration meeting as to cost to be paid to Mr. Ardesar for land at Kurlá. If you cannot conveniently attend then, you can always have the written evidence to look over, and on which to base your opinion, in case Mr. Addis and I cannot agree." On the Thursday (February 11) named in that letter of the 5th February, the first meeting was held pursuant to the notification to Mr. Hay contained in that letter, and it is impossible to deny that he had due and ample notice of that meeting. But it is evident that he and his co-arbitrators were all of opinion that a third arbitrator was synonymous with an umpire, who would not have to arbitrate, unless Mr. Campbell and Mr. Addis differed. And, in the minutes of the proceedings of those two arbitrators, Mr. Hay is treated as umpire. By those minutes, in the handwriting of Mr. Campbell, it appears that the first meeting of the arbitrators, Addis and Campbell, opened with the following question, addressed to them by the plaintiff: "Have you appointed an umpire, in case you cannot agree?" To which Mr. Addis and Mr. Campbell replied:—"We have agreed upon Mr. Andrew Hay, Broker of Bombay, as an umpire in the matter."

Mr. Hay did not attend at the first or any other of the meetings of the arbitrators, and was not consulted by his co-arbitrators whose award was made without his having any knowledge of their decision, save that they had not differed on any point, and had, therefore, not troubled him in the matter. He was willing, he says, to have attended, if it had been considered necessary. In the award Mr. Hay is described as an arbitrator.

The Collector of Tháná, within whose district the land is situated, did not personally superintend the arbitration; but

it is not disputed that the Mámlatdár, duly authorized in that behalf, attended at the first two meetings of the arbitrators, Mr. Addis and Mr. Campbell, held on the 11th and 15th of February 1869. The next meeting was on the 16th of February; at this the Mámlatdár was not present, neither was he at any of the four remaining meetings, the last of which was on the 5th of March following.

From Mr. Campbell's evidence, it would appear that, at the close of each meeting, the date to which it was adjourned was fixed. Thus, at the first meeting, the date of the second was settled; and, in accordance therewith, the Mámlatdár attended at the second meeting at which, however, no business was transacted; but a further adjournment was arranged, and although the day to which the matter stood adjourned was communicated to the Mámlatdár in his own language, he did not attend on that day. No notice was given to him of the subsequent meetings. The Mámlatdár is described by Mr. Campbell as not understanding English; but in reply to a question put by the Third Division Court, Mr. Campbell stated that there was a person present who interpreted to the Mámlatdár at both of the meetings which he attended. According to Mr. Campbell's recollection, it would appear that he and Mr. Addis informed the Mámlatdár at the first meeting of the appointment of Mr. Hay, and that they explained to the Mámlatdár such part of the proceedings as they thought it requisite for him to know. And the Mámlatdár did not make any complaint that he did not understand what was going on. Mr. Campbell's evidence stands in all respects uncontradicted. Neither Mr. Addis, nor the Mámlatdár (who would properly have been witnesses for the defence), nor any other witness was called on behalf of the defendant. Under the circumstances above detailed, we must take it that the Mámlatdár sufficiently understood the proceedings at the first and second meetings.

The Mámlatdár, though present throughout the proceedings at the first meeting, made no objection to the effect that Mr. Hay's appointment as third arbitrator or umpire was not in writing, or was in anywise irregular, nor did

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the Mámlatdár object to Mr. Addis and Mr. Campbell proceeding on that day, in the absence of Mr. Hay, with the arbitration. They did so proceed with it. On that day they examined the plaintiff and his witness, Ignacio Pereira, and received several documents in evidence. The Mámlatdár must have been fully aware that no third arbitrator was present.

The award was made on the 12th of April following, and was signed by Mr. Campbell and Mr. Addis at the same time and place. By it a sum of Rs. 58,278 was awarded to the plaintiff as compensation for his land, together with interest at six per cent. per annum until payment.

Some correspondence took place between the plaintiff and the Collector of Tháná, regarding the payment of this amount, and, on the 9th of June, the plaintiff applied by letter to be furnished with a copy of the award, in accordance with the 23rd section of the Act, to which the Collector replied on the 12th June, excusing himself for not sending a copy because the original had been forwarded to Government, but promising to send him a copy as soon as the original was returned. On the 9th of July following, the plaintiff wrote to the Government Solicitor, complaining that he could get neither the money, nor a copy of the award, and threatening legal proceedings, unless one or the other were given to him. By letter of the 21st of July, the Government Solicitor informed him that Government did not consider that any award had been made in accordance with Act VI. of 1857. The plaint in this suit was filed on the 3rd December 1869.

The 31st section of the Act is as follows :—"No award of arbitrators, made in accordance with the provisions of this Act, shall be liable to be reversed or altered, except by the decision of a Civil Court on the ground of corruption or misconduct of the arbitrators. In case the award shall be so reversed, the matter shall be referred to another arbitrator or arbitrators to be appointed in the same manner as the first. All suits to set aside an award under this Act shall be instituted within three months from the date of the award."

It stands admitted by counsel on both sides that this being an action on the alleged award, the question is not whether such matter appears in evidence as would warrant the Court in setting aside the award, but, whether there is such a defence apparent as would support what in England is styled a plea of *nul tiel agard*, that is to say, whether the circumstances proved warrant the Court in pronouncing the award to be a nullity.

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There are three modes in which an award made under Act VI. of 1857 may be defeated. 1. By refusing to file and execute it under Sec. 327 of the Civil Procedure Code. 2. By setting it aside. 3. By holding it to be null and void.

The various grounds of objection to an award, which would warrant the Court in adopting any one of those three courses, may be removed by the express or tacit waiver of those grounds by the parties or their duly authorized agents. For instance, an award made after the expiration of the time originally or by enlargement appointed for the delivery of it, is a nullity; but if the parties, after the time has so expired, acquiesced in the arbitrators proceeding with the arbitration, such acquiescence precludes them from insisting upon the objection that the arbitrators' authority was at an end before they made their award. The consent or tacit acquiescence amounts to a new submission: Russell on Arbitration, pp. 134, 136. 4th Ed.

With respect to the appointment of Mr. Hay as "third arbitrator and umpire," we are inclined to the opinion that, under the circumstances which we have described, that appointment must be considered as having been in "writing" within the meaning of Sec. 12, and as made by Mr. Addis and Mr. Campbell before they entered on the question of compensation referred to them. That section neither provides that the writing shall be signed by the arbitrators, or either of them, nor specifies any formality as indispensable in the writing. It is manifest that after Mr. Addis had written to Mr. Campbell, authorizing him to appoint Mr. Hay, and before the appointment was communicated in writing by Mr. Campbell to Mr. Hay, Mr. Campbell and Mr.

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Addis had an interview, and the latter verbally agreed with the former that Mr. Hay should be appointed. The concurrence at that interview is the judicial act, and not the signing which is merely ministerial : *in re Hopper* (a), and distinguishes the present case from *Lord v. Lord* (b) and *Peterson v. Ayre* (c). An arbitrator may delegate a ministerial, but not a judicial function : *Thorp v. Cole* (d). The appointment of Mr. Hay as "umpire" was also, as we have seen, entered on the minutes in the presence of Addis by Campbell, when both Addis and Campbell informed the plaintiff, in the presence of the Mámílatdár, that Mr. Hay had been so appointed. Cockburn, C.J., *in re Hopper*, said : "We ought not to be over ready to set aside awards where parties have agreed to abide by the decision of a tribunal selected by themselves, unless we see something radically wrong in the proceeding, and that the parties have not had the benefit of the judgment of the arbitrators as to the appointment of a fit and proper person to be umpire." As to the alleged necessity that the arbitrators should sign at the same time, Cockburn, C.J., said : "I think that is not necessary where the arbitrators have met and discussed the appointment of the umpire and agreed upon it. That is very different from one signing the appointment alone, and then sending it to the other who, therefore, signs it ; which, as far as appears, was all that occurred in *re Lord v. Lord* ; there was no combined action of the two, or judicial exercise of their minds upon the matter. That case therefore is distinguishable. The signing the name to the appointment is not a judicial act, but the record of it" (e). The observations of Blackburn, J., are to the same effect (f) ; and Lush, J., said that the marginal note to *Peterson v. Ayre* was too large, as the arbitrators had never agreed upon the terms of their award ; and Blackburn, J., added that it was not shown that they had ever come together to consider it (g). In *Hopper's case*, the deed of submission required that the appointment of the umpire by the arbitrators should

(a) 8 B & S. 100 ; S.C., L. R. 2 Q. B. 367, 375.

(b) 5 EL & BL. 404. (c) 15 C. B. 724. (d) 2 C. M. & R. 367.

(e) 8 B & S. 112, 113.

(f) *Ibid.* 115.

(g) *Ibid.* 109.

be "in writing *under their hands*" by endorsement on the deed. Here the Act simply requires that the appointment shall be "by writing." There is less difficulty in the way of the plaintiff here than in that of the party seeking to uphold the award in *re Hopper*, for there is an important element in this case, not in that of Hopper, namely, that if the appointment of the third arbitrator be not efficiently made, the Collector or other officer representing Government had the immediate remedy in his own hands. The third section of Act VI. of 1857 enacts that whenever any land shall have been declared to be required for a public purpose, "the Government shall direct the Collector of the district or some other officer specially appointed in that behalf to take order for the acquisition of the land," &c. Throughout the rest of the Act, the persons designated in that section are spoken of as "the Collector or other officer." The Mámlatdár is included under the term "other officer." If the arbitrators appointed by the parties do not fulfil their duty of nominating and appointing "by writing," before they enter on the matter referred to them, a third person to act with them as arbitrator, and neglect to make such appointment for a period of one week after having been required to do so, the 12th section requires that "the Collector or other officer shall appoint a third arbitrator." Neither the Mámlatdár nor the Collector did in anywise intimate an opinion that the appointment of Mr. Hay was either irregular or null. Nor did they require the arbitrators, Mr. Addis and Mr. Campbell, to appoint a third arbitrator, nor did the Mámlatdár or Collector, after the lapse of a week or any other time, appoint a third arbitrator.

This acquiescence of the Mámlatdár in the appointment and his subsequent conduct render unimportant the question, whether or not Mr. Hay's appointment was made "by writing" as required by the Act.

That subsequent conduct, as already mentioned, was this: that, although, at the first meeting of the arbitrators, the appointment of Mr. Hay was mentioned, and the Mámlatdár must have been perfectly aware that he was not present, the

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Two other arbitrators were permitted by the Mámlatdár to proceed with the arbitration, and to take important oral and documentary evidence without objection on his part—a silence which indicates either that he, like the plaintiff and Mr. Addis and Mr. Campbell, considered that Mr. Hay was to be resorted to only as an umpire, or that, however that might be, he (the Mámlatdár) was willing that Mr. Addis and Mr. Campbell should proceed with the arbitration in the absence of Mr. Hay. The acquiescence of the Mámlatdár in their so proceeding is rendered all the more weighty and significant by the power with which the 16th section of the Act invests “the Collector or other officer,” i.e., here the Mámlatdár, with regard to all three arbitrators, “for securing their attendance and the due completion of the award” by the same coercive means which “the Collector may legally exercise towards witnesses summoned before him, when acting judicially, for the purpose of compelling them to attend and give evidence.” That, however, neither the Mámlatdár nor Collector exercised in this case. On the contrary, the Mámlatdár was apparently satisfied to allow matters to take their course. Whether he informed the Collector or not, as to what that course was, does not appear, and is not important. The Mámlatdár had become and was the officer duly authorized under the Act.

It has, however, been argued for the defendant, the Secretary of State for India, that he ought not to be bound by the acts or omissions, the remarks or the silence, of a revenue officer in the subordinate position of the Mámlatdár of a Táluká. It was, however, neither the fault of the plaintiff, nor of the arbitrators, Addis and Campbell, that the defendant was not represented by a revenue officer of higher grade and greater attainments than the Mámlatdár. The Collector, we presume, either not finding it convenient to attend at the arbitration, or for some other reason not in evidence, sent his subordinate revenue officer, the Mámlatdár. If this were an imprudent act, we should greatly hesitate before we visited its consequences upon the plaintiff, whose land was being taken from him by the defendant, for public purposes,

whether he (the plaintiff) would or not, and who was not in any manner a party to the nomination of the Mámlatdár. We cannot give any weight to the argument that the Mámlatdár probably did not know the law. Like other subjects of Her Majesty, he must be presumed to know the law. He, as such subject, must be taken to be cognizant of legislative enactments (and amongst them Act VI. of 1857) and, moreover, to construe them aright: Per Lord Stowell, 1 Dodson Rep. 392. Indeed, it is manifest from their two letters, already mentioned, that both of the Mámlatdárs were acquainted with Act VI. of 1857 (and no doubt the Government translations of that Act must have been perfectly accessible to them). Even if this were otherwise, the consequences of their ignorance could not, with the semblance of justice, be placed upon the plaintiff. If an unfortunate selection of its revenue officer to act under Act VI. of 1857 in the acquisition of land for a public purpose, and in superintending the arbitration for the assessment of compensation to the owner, has been made on behalf of Government, that circumstance is no reason in law or equity for forcing the owner of the land to a new arbitration, or for not holding Government bound by the conduct of its agent and servant.

In the case of *Harbam Narsi v. The Government of Bombay*, which was an application, under Sec. 327 of the Civil Procedure Code, for leave to file an award made under Act VI. of 1857, two objections were made by the defendants—one was that the Court had no power to file, under the Civil Procedure Code, an award made under Act VI. of 1857. But Sir M. Sausse, C.J., held that the Court had power so to file the award after the expiration of the three months allowed by Sec. 31 of Act VI. of 1857 within which proceedings may be taken to set aside an award on the ground only of corruption or misconduct of the arbitrators. The other and, as regards the present case, most important objection made by the Government of Bombay, was that the award had not been made in conformity with the provisions of Act VI. of 1857, inasmuch as the Collector of Bombay, having duly nominated an arbitrator on behalf of Govern-

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ment, resigned his office, and the arbitrator, so nominated, was subsequently by Government appointed Collector of Bombay, and then, declining to act as arbitrator, nominated, in his collectoral capacity, another person as arbitrator on behalf of Government, who, together with the arbitrator named by Harbam Narsi, made the award. For Government it was contended that the new Collector ought to have continued to act as arbitrator, and had not authority to appoint another in lieu of himself. Sausse, C.J., however, said :—" That person " (the new arbitrator appointed by the new Collector) " was suffered by the Government of Bombay to carry on the arbitration for several months to its close, and he was an assenting party to the award, which does not appear now to be in accordance with the views or wishes of the Government. I should be strongly coerced by authority, before I would allow such an argument to prevail at this stage, where no objection was made during the pendency of the arbitration. Were there any irregularity, I would hold that the Government of Bombay had, by its acquiescence and active participation in the reference so constituted, waived any right to object upon that ground." He also held that the arbitrator, originally appointed, had, by the act of the defendants in appointing him to be Collector, become " incapable of acting " as arbitrator, and, therefore, that the nomination by him of another arbitrator on behalf of Government had become necessary, and was legal. He concluded his judgment as follows :—" If Government had any well-founded expectation that this award could have been set aside on the ground of the corruption or misconduct of the arbitrators, it would have been quite justified in impeaching it, but if they had not, (and no other ground of impeachment is allowed under Act VI. of 1857,) then I will venture to suggest that it would be more becoming the dignity of its position to yield a ready acquiescence to a legal, though distasteful, award, than to throw small and technical delays in the way of the petitioner's obtaining his rights ; for, Government must bear in mind that it is their act which has compelled this owner to part with his land, and that they have put him in the position of no longer having the con-

trol of his property, although he has not yet obtained the compensation for it ;” and he mentioned the observations of Erle, J., in *The Queen v. South Devon Railway Company* (h). The powers given to Government by Act VI. of 1857 are greater than those given by the Lands Clauses Consolidation Act to railway companies with reference to which Act the observations of Erle, J., were made.

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We have not referred to passages in the judgment in *Harbam Narsi v. The Government of Bombay* with a view to attribute to Government any less worthy motive in resisting the present action than a desire to protect, by such means as circumstances may admit, the public treasury from what Government may believe to be too large an award of compensation, (that objection itself not being open to Government,) but we have adverted to them for the purpose of showing the importance attached by the court to acquiescence in the continuance of the arbitration notwithstanding the existence of formidable objections to the validity of its constitution, and to the indisposition of the Court by its action to render the Act more arbitrary in its operation than the language of the Legislature clearly requires. By the same principle, it will be seen, in a case in the Court of Exchequer Chamber to which we shall presently advert, that court has been recently guided. Even where arbitration is voluntarily resorted to, the court should, according to Alderson B., struggle rather to uphold than to defeat an award : *Wynne v. Edwards* (i) ; *ut res magis valeat quam pereat* as Croke J. puts it in *Berry v. Perry* (j) ; or as Coke, C.J., said : “The reason why awards are to be favoured” is “*Quia expedit Reipublicæ ut sit finis litium*” (k). If this be so in ordinary cases, *a fortiori* should it be so where an award of compensation has been made under an enactment by which a compulsory sale of his land is forced upon a subject by the State, and the State resists that award, the enactment too being one which largely vests the regulation and superintendence of the arbitration in an officer of the State and arms him with unusual powers.

(h) 15 Q. B. 1045, 1046.

(j) 3 Bulstrode 65.

(i) 12 M. & W. 712.

(k) Ibid. 66.

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For these reasons we think that even if the defendant had, within three months after the date of the award, taken proceedings to have it set aside, those proceedings must have been abortive.

The award was made on the 12th April 1869. On the 12th July three months had elapsed without any steps having been taken to set it aside; not until the 21st July was the plaintiff even informed that it would be disputed; and to this day no step has ever been taken to set it aside. No fatality is assigned as a reason why timely steps should not have been taken for that purpose, if the defendant had a case which would have warranted such a proceeding.

There has been, then, not only acquiescence by the Government representative, the Mámlatdár, while the arbitration was going on, but also by the silence of Government itself until the period had elapsed within which, by Sec. 31 of the Act, steps might have been taken to set aside the award on the ground of corruption or misconduct (if any) of the arbitrators.

We are, then, of opinion that even if Mr. Hay's appointment were not made by a writing or writings sufficient to satisfy the exigency of the 12th section of the Act, any such objection has been fully and completely waived, not only by the conduct of the Mámlatdár, but also by that of Government to which we have adverted.

In the same manner, the objection based upon the non-attendance of Mr. Hay, and upon his not having taken any part whatever in the making of the award, has, we think, been finally waived. *In re Marsh* (1) is a case in point. There, as here, the reference was to two arbitrators, Keeling and Brummitt, and a third arbitrator to be named by them. Keeling and Brummitt appointed Phillips umpire. Haywood, the party against whom the award was ultimately made, took no objection to the appointment of Phillips as umpire and did not call upon him to

(1) 16 L. J. N. S., Q. B. 330, also reported *nom. Haywood v. Marsh*, 11 Jur. 657.

attend the meetings. The arbitration proceeded without the intervention of Phillips,—neither Haywood nor Marsh objecting—and eventually Keeling and Brummitt made an award against Haywood. On a motion to set it aside, made on behalf of Haywood, Coleridge, J., refused it, saying: “Upon the last point” (the non-intervention of Phillips in the arbitration) “there is no doubt whatever, nor does Mr. Addison” (counsel for Haywood) “dispute that if there was an acquiescence, as to the two arbitrators deciding upon the matters in difference, no objection could be taken to the absence of the third arbitrator; but he says this—that at the last meeting there having been a difference between the parties, that set the whole matter quite open and enabled him to take this objection which had been waived all the way through. If all parties agreed to the terms of the submission,” (i.e. the two arbitrators proceeding *absente* Phillips) “it was too late to go back to take advantage of that which they had already acquiesced in. They ought in fairness to have given notice that they would object to the authority of the arbitrators. It would be a violation of all principle to admit this objection, remembering that this motion is to set aside the award which is against the applicant.” In the report in the *Jurist*, Coleridge, J., is represented as saying: “On the last point, I think, there can be no doubt. It was too late for the defendant to go back after he had so long agreed tacitly to go on with only two arbitrators. It would be against all principle to allow it.” And in *Peterson v. Ayre* (*m*) Jervis, C. J., giving judgment on behalf of the Court, said: “If the case had turned upon the first and fourth points only, I should have not felt inclined to disturb the award; because I think there is enough on the face of the affidavits to show that Brown” (to whom Peterson, the plaintiff, had assigned his interest in the matter in dispute, and against whom the award was made) “and the two arbitrators, by whom the award was ultimately made, treated Garford throughout, not as a third arbitrator, but as an umpire to be consulted only in

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(*m*) 14 C. B. 665, 676.

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 ARDESAR And in *The Blyth and Tyne Railway Company and Wilson*
 HORMASJI (n) where the solicitor and agent of one of the parties made
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 v. to make an award, but assented to his doing so, Wightman,
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 improper appointment. In *Matson v. Trower* (o) Abbott, C. J.,
 (Lord Tenterden) held an award to be good though made by
 an umpire appointed by two arbitrators without any authority
 for that purpose, and though he examined the parties
 separately, inasmuch as they attended him and made no
 objection at the time. See also as to acquiescence *Mackenzie*
v. Hume (p).

As already observed, there was not only an omission to
 take any objection to the mode in which Mr. Hay's ap-
 pointment was made, or to the other arbitrators proceeding
 without his presence or co-operation, but there was not any
 exercise of the extraordinary powers vested by Secs. 12
 and 16 of the Act in the Collector or other officer (here the
 Mámlatdár) to appoint a third arbitrator, if Mr. Hay were not
 duly appointed by his co-arbitrators, or to secure his attend-
 ance as such third arbitrator. And within three months
 from the date of the award the defendant took no proceed-
 ings to have it set aside.

It is, however, said that inasmuch as the Mámlatdár did
 not attend the subsequent meetings, he cannot be regarded
 as having acquiesced in the absence of Mr. Hay from those
 meetings. And it is also objected that notice of those
 subsequent meetings was not given to the Mámlatdár, and
 that he was entitled to such notice.

We are of opinion that the Mámlatdár having waived the
 objection as to Mr. Hay's absence at the first meeting, by
 permitting the arbitration to proceed in Mr. Hay's absence,
 waived it altogether, and on this point *in re Marsh*, already
 cited, is a sufficient authority.

(n) 11 W. Rep. (Eng.) 705.

(o) Ry. & M. 17.

(p) 1 Taylor & Bell 41.

Even if this were not so, and that neither by the Mámlatdár, nor by the Government, there were any waiver of the fact that the third arbitrator was not consulted by the others and did not take any part in the arbitration, it would remain a question, to which we shall presently advert, whether, although such a circumstance may have been, as evidence of mistake or misconduct on the part of the arbitrators, sufficient ground for setting aside the award, if the defendant took measures for that purpose within three months from its date, it is sufficient to support a defence of *nul tiel agard*.

As to the absence of notice to the Mámlatdár of the meetings subsequent to the first and second, we observe that he had in fact notice of the third. The third issue, therefore, must be amended in order to raise the question intended to be raised between the parties. As altered it will be "whether the defendant by his agent had notice of any meeting of the arbitrators subsequent to the third meeting." If the Mámlatdár had attended the third meeting, he would have received notice of the fourth and so on. But howsoever this may be, and whether the notice was or was not sufficient, the not giving of that notice, though it may have been an omission, which would be such irregularity and misconduct on the part of the arbitrators as would have warranted the court in setting aside the award within proper time, will not support a plea of no award : *Thorburn v. Barnes* (q) which was a much stronger case than the present, inasmuch as the arbitrators made their award without giving the plaintiff any notice of the only meeting held by them, or any opportunity of being heard. *Braddick v. Thompson* (r) is also a direct authority to the same effect.

Those cases involved charges of misconduct against the arbitrators, and also involved the question as to the mode in which a party might avail himself of such charges, and, therefore, are relevant to the question, whether, assuming that there had not been any waiver, on behalf of the defendant, of the objection existing here, namely, that two of the arbitrators out of

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(q) L. R. 2 C. P. 384 ; S. C. 36 L. J. C. P. 184.

(r) 8 East 344.

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three made the award without consulting the third arbitrator and treated him merely as an umpire, such an objection can support a plea of *nul tiel agard*. Those cases then lead us to the consideration of the other authorities as to the mode in which such an objection may be successfully made.

In *Beck and Jackson* (s) Cresswell J., adopting the rule stated in Russell on Awards p. 209 (3rd Ed. p. 208 ; 4th Ed. p. 206) when speaking of the duty of joint arbitrators, says : " As they must all act, so must they all act together. They must each be present at every meeting ; and the witnesses and the parties must be examined in the presence of them all ; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision," and, accordingly, he and Crowder J., on motion made, within the proper time, to set aside an award executed by two arbitrators in the absence of, and without finally consulting, the third, granted an order absolute to set aside the award. The covenant in the submission there was to stand by and perform the award of A and B and " of such third person as should be chosen by them to arbitrate, adjudge, and determine jointly with them as aforesaid or any two of them." That case would, therefore, (if there were no waiver or acquiescence) be a strong authority for the defendant on a motion to set aside the award. *Pering v. Keymer* (t), *Templeman v. Reed* (u), *Plews and Middleton* (v), *Morgan v. Boulton* (w), *Little v. Newton* (x), and *Hawley v. The North Staffordshire Railway Company* (y) were all motions to set aside the award—a distinction between them and the present case of an action upon the award, which, in our opinion, was not sufficiently observed by the Third Division Court.

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| (s) 1 C. B. N. S. 695. | (t) 3 Ad. & E. 245. |
| (u) 9 Dowl. 962 ; S. C. 6 Jur. 324. | (v) 6 Q. B. 845. |
| (w) 11 W. R. 265. | (x) 2 M. & Gr. 351. |
| (y) 12 Jur. 389 ; S. C. 2 De Gez. & S. 33. | |

The fact, that it is the practice of the courts to set aside awards made by two arbitrators in the absence of the third, and without giving him notice of their meetings, shows that such awards are regarded merely as irregular, and not as null—as voidable and not as void. In *Doe v. Turnbull v. Brown* (z), Abbott, C. J., said: "This is clear, where an award may be considered as a nullity, and nothing can be done upon it but by suit, the court will not interfere to set aside the award, because any suit brought to enforce it must fail." And in *King v. Joseph* (a) Gibbs, C. J., said in substance that if the award is void, it would be superfluous to set it aside, and the court would not do so. And in *Murphy v. Keller* (b) Lord Chancellor Brady, after referring to those two cases, said: "So that the courts of law have declared, and, as I think, consistently with common sense, that when an award is void, they will treat it as a mere nullity and will not, therefore, set it aside, unless under some such peculiar circumstances as those in *Doe v. Brown*." And Sir T. Plumer M. R. in *Goodman v. Sayers* (c) said: "If two arbitrators out of three meet alone, excluding the third, or not giving him notice; and if they receive evidence, or hear discussions, without him, their proceeding is *irregular*."

Wade v. Dowling (d), which has been much relied upon for the defendant, was an action upon an award, to which 'no such award' was pleaded. The submission was to G and S and to an umpire to be appointed by them to arbitrate, &c., concerning the matters referred, "so as the award of the said arbitrators and umpire, or any two of them, should be made in writing under their hands ready to be delivered" on or before the 1st October then next, &c., and it was provided "that the award of the said arbitrators and umpire or any two of them should be binding on the said parties." Though the third person was there styled umpire, the context of the submission shows that he was really intended to be a third arbitrator and not an umpire. C was appointed to that office by G and S who afterwards partly heard

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(z) 5 B. & C. 384.

(a) 5 Taunton 453.

(b) 2 Irish Chan. Rep. 417, 425.

(c) 2 Jac. & W. 261.

(d) 4 El. & Bl. 44.

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the case, but, not agreeing, called in C who examined some witnesses and conferred with G and S. It appeared that he left them without expressing any opinion, but afterwards, in the absence of G and S, executed the alleged award and sent it by post to G, 'whose opinion he had adopted', and G executed the same document at Bristol on the next day, and sent it back to C by whom it was published in London in due time. The fact, that the document was executed by G and S on different days, and at different places, and that there had not been any previous concurrence between G and S, was held to support the plea of *nul tiel agard*. The judgments there delivered show that it was upon that ground alone, namely, that the two arbitrators did not sign the award *simul et sewel*, and that there had not been previous concurrence between them, that the Court of Queen's Bench decided against the award in that case; and it cannot be regarded as an authority that if an award is to be made by three arbitrators or a majority of them, the fact, that two arbitrators made the award without consulting the third, will support a plea of *nul tiel agard*.

Fátma Bibi v. The Collector of Surat (e) was a still plainer case of no award than *Wade v. Dowling*. Neither the three arbitrators nor any two of them ever met and they recorded their respective opinions at three different dates and did not make any joint award whatever.

There has not been any case cited to us in which it has been decided, either in an action on the award itself or upon a bond, conditioned for the performance of the award, that if an award is to be made by three arbitrators or a majority of them, the making of the award by two arbitrators without consulting the third, will support a plea of *nul tiel agard*, and thus nullify the award, whereas there are cases of a different complexion. Of these *Sallows v. Girling* (f) and *Berry v. Perry* (g) should be mentioned. In *Sallows v. Gir-*

(e) 8 Bom. H. C. Rep. A. C. J. 79.

(f) Cro. Jac. 277; S. C. 1 Bulstrode 123, Yelverton 203, Brownlow 112.

(g) 3 Bulstrode 62; S. C. nom. *Berry v. Peariny*, Cro. Jac. 399, Moore 849.

ling the action was upon a bond, conditioned to stand to the award of A, B, C, and D, so as the said arbitrators or any three or two of them did make the said award under their hands and seals before a given day. The defendant pleaded that neither they nor any three or two of them made any award. The plaintiff replied that two of them made an award under their hands. The defendant demurred, and there was judgment for the plaintiff in the King's Bench. A writ of error was brought upon this judgment in the Exchequer Chamber, and it was there held that an award by two or three of the four would be good; but because the replication was that the award was made under their hands, and did not say under their hands *and seals*, the judgment of the King's Bench was reversed, which last-mentioned objection does not exist in the present case.

Berry v. Perry was also an action of debt on a bond to stand to the award of four men *ita quod* the award be made and delivered in writing within, &c., under the hands and seals of the four or of any three of them. The defendant pleaded *nul tiel agard*. The plaintiff replied that three of the arbitrators did make an award and delivered it under their hands and seals, and non-performance by the defendant. The defendant demurred to that replication, and the King's Bench, after hearing the case thrice argued, followed the doctrine on the first point above mentioned in *Sallows v. Girling*, and held the replication to be good and accordingly gave judgment for the plaintiff.

To the same effect is *Hill v. Langley (h)*. It was an action of debt on a bond conditioned to perform an award. The defendant pleaded no award made. The plaintiff replied that the submission was to the award of four, so that they made it by the 16th of November and signified it under the hands and seals of two; and then he alleged an award under the hands and seals of two. The defendant demurred, conceiving the award to be void, because the submission was to four. But the court, following the two foregoing cases, gave judgment for the plaintiff.

(h) Ventris 50; S. C. 2 Keble 571, 580.

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Whitmore v. Smith (i) is an important case. The Exchequer Chamber (reversing the judgment of the Court of Exchequer reported 5 H. & N. 824) held that where an award is made upon all the matters of difference and is in the required form, and intended to express their decision, an objection that they adopted the opinion of a third person by which they agreed to be bound, and exercised no judgment of their own in the matter, cannot be raised under a plea of *nul tiel agard*. The argument urged by counsel for the defendant and adopted by the Judges of the Court of Exchequer was that the award was not according to the submission, inasmuch as the parties had not what they bargained for, namely, the judgment of the arbitrators; that the decision was that of a third person and not of the arbitrators; that there was not any act of the arbitrators' minds upon the question referred, and, therefore, the award was not theirs. *Wade v. Dowling*, *Little v. Newton*, and *Eads v. Williams* (j) were cited. But Willes J., in delivering the unanimous judgment of the Exchequer Chamber, after observing that the liability of the award *to be set aside* for misconduct of the arbitrators depended upon the question of fact, whether, in acting upon Rotton's opinion, they did more than the parties themselves consented to (on which question the Exchequer Chamber pronounced no opinion), the question remained, whether the objection could be raised by plea, which the Exchequer Chamber was of opinion that it could not, said: "The award was made upon all the matters referred and no more; it was made in the requisite form, and it was intended by the arbitrators to express their decision, adopting the opinion of Rotton. It was, therefore, such an award as the declaration alleges; and the plea of no such award is negatived by the facts. In truth this objection, assuming it to be well founded, is one of a sort which ought to be brought forward whilst the matter is fresh, in the manner, and within the period prescribed by the statute of Wm. III. in cases which fall within its provisions, or by the practice of the courts in other cases within their summary jurisdiction—a jurisdiction

(i) 7 H. & N. 509.

(j) 4 De Gaz M. & G. 674.

now extending over a large number of cases, which formerly belonged exclusively to the Court of Chancery (see Com. Dig. Arbitrament (A), *Nichols v. Roe*, 3 M & K. 431)." He, then, proceeded to show the importance of maintaining that distinction. A subsequent suit in equity to set aside the same award also failed: 1 Hem. & M. 576; affirmed on appeal, 2 Do Gex, J. & S. 297.

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The plaint alleges the appointments of Addis, Campbell and Hay to be in writing. The award also states the appointments of Addis and Campbell to be in writing and mentions the appointment of Hay, but does not allege it to have been in writing—an omission which we could not permit to vitiate the award, if that appointment were in fact in writing, or if the absence of a writing were waived by the parties. Both in the plaint, and in the award, the latter is alleged to be made by a majority of the arbitrators. The 20th section of Act VI. of 1857 enacts that "on the close of the inquiry the arbitrators, or a majority of them, shall deliver a full and complete award in respect of the matter referred to them." The force of the disjunctive "or" is noticed by Parke B. in *Hetherington v. Robinson* (k) where the absence of it determined the court to refuse to enforce an award. A plea of *nul tiel award*, under such circumstances as we have here, must aver that no award was made by a majority of the arbitrators: *Hinton v. Crane* (l). The written statement (para. 5) does accordingly deny that the award was made by a majority of the arbitrators. The submission under the Act being to the award of the three arbitrators or of a majority of them, the plaintiff must succeed on the fourth issue, the fact being that the award has been made by two of the three arbitrators, and upon the whole of the matter referred. In an action upon an award, as distinguished from an action upon a bond, or obligation, conditioned to perform an award, a plea that the arbitrators did not publish their award of, and concerning, the matters in difference, *modo et forma*, merely puts in issue the fact that such an award as that declared on was

(k) 4 M. & W. 608. (l) 3 Keble 675; Russell on Arb. 523, 4th Ed.

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made concerning the premises, *i.e.*, on all the matters submitted, and does not put in issue the validity of the award: *Adcock v. Wood* (m) in which case *Fisher v. Pimbley* (n) and *Dresser v. Stansfield* (o) were explained by Parke B. (p). If in England the award, as set out in pleading by the plaintiff, is bad, that does not raise any question for the jury. The objections on the face of the award are for the court on demurrer or in arrest of judgment.

Mr. Hay did not attend the meetings, and neither the plaintiff nor the award alleges that he did. Nor does the Act lay down in positive terms that all three arbitrators should attend. Assuming, however, that they ought to have done so, it is impossible to say that it was anything more than a mistake on the part of Addis and Campbell to proceed in the absence of Hay. There certainly was not any attempt to keep him away. On the contrary, Mr. Campbell's letter of the 2nd February 1869 shows that he pressed Mr. Hay to attend; and Mr. Campbell's letter of the 5th February 1869 gave to Mr. Hay express notice that the first meeting was to be held on the 11th February, although both it and his previous letter of the 2nd prove that he considered Mr. Hay to be an umpire. Mr. Campbell's evidence shows that Mr. Addis was under the same impression, and Mr. Hay also taking that erroneous view of his position did not attend. Here was a common mistake—a mistake induced by this mode of submission to three arbitrators, which so frequently misleads as to have been condemned by Mr. Justice Coleridge in *Templeman v. Reed* as "senseless and mischievous, founded on a totally wrong principle, expensive in operation, and constantly ending in failure and disappointment." Addis and Campbell, being aware that Hay believed himself to be umpire, and, therefore, did not intend to attend, proceeded, after giving him notice of the first meeting, with the arbitration in his absence; and so far as regards the first meeting they were well entitled thus to do: *Dalling v. Matchett* (q). Of the other meetings they ought to have given him

(m) 6 Exch. 814. (n) 11 East 193. (o) 14 M. & W. 822.
(p) 6 Exch. 819. (q) Willes 215, 217; S. C. Barnes 57.

notice. Their omission to do so was a mistake which, at the highest, was, under the special circumstances of this case, misconduct of a mild character which, if there had been no waiver of it by the Māmlatdār, would, we think, have been only ground for setting aside the award on some proceeding taken within the time prescribed by Sec. 31 of Act VI. of 1857 : *in re Hall* (r), *Sreenath Ghose v. Raj Chunder Paul* (s). In the latter case there were nine arbitrators, some of whom did not attend all of the meetings, and one arbitrator never attended any meeting. This the Court held to be an irregularity amounting to misconduct, but not such a circumstance as would nullify the award. That case may also be usefully referred to on the subject of waiver. That a mistake or misconduct of arbitrators cannot be pleaded to an action on the award is firmly settled law : *Thorburn v. Barnes* (t), *Veale v. Warner* (u), *Grazebrook v. Davis* (v), *Braddick v. Thompson* (w).

Finally, looking at the plaint and written statement (extended as they are by the issues raised between the parties ; Sec. 139, Civil Procedure Code) with all of the liberty with which the Court is in the habit of treating proceedings under the Civil Procedure Code, and whether as a Court of Law or a Court of Equity we deal with this case, we think that the defendant cannot successfully resist the award, in arriving at which there has been some irregularity,—irregularity however, which has been acquiesced in, and of which the defendant cannot be permitted to avail himself.

Although it is not absolutely incumbent upon us to arrive at findings upon all of the issues, inasmuch as the findings on some dispense with the necessity for any findings upon others, yet it may be convenient that we should do so.

We find the first, second and fourth issues in the affirmative and for the plaintiff. We find the third issue, as

(r) 2 M. & Gr. 847. (s) 8 Calc. W. Rep. Civ. R. 171.

(t) L. R. 2 C. P. 384; S. C. 36 L. J. C. P. 184.

(u) 1 Wm. Saunders 327a, N. (3) and notes (k) and (l) where the cases are collected.

(v) 5 B. & C. 534.

(w) 8 East 344.

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amended by us, in the negative for the defendant. We find the fifth issue, so far as it regards the right to raise the second and third issues, for the plaintiff and in the negative; and so far as it regards the right to raise the fourth issue, for the defendant and in the affirmative, which fourth issue, however, we have found as aforesaid for the plaintiff and in the affirmative. The sixth issue is incorrectly framed, for no irregularity is alleged in the fourth issue. So far as the sixth issue regards the second and third issues, we find it in the affirmative, and for the plaintiff. We find the seventh issue in the affirmative and for the plaintiff to the extent of the whole amount claimed by him. We frame an eighth issue, Sec. 141 Civil Procedure Code, (the question in which was supposed apparently by the parties to have been, but in fact was not, properly raised by the fourth and sixth issues), namely, whether the defendant, by his duly authorized agent, acquiesced in the non-intervention of Andrew Hay, the third arbitrator, in the arbitration and also acquiesced in the two other arbitrators, namely, William Judson Addis and John Campbell, proceeding with the said arbitration and making an award without the attendance of the said Andrew Hay at any of the meetings of the said two other arbitrators, and without consulting the said Andrew Hay as to the matter referred to the said three arbitrators or a majority of them, and we find the said eighth issue in the affirmative and for the plaintiff.

We, accordingly, reverse the decree of the Third Division Court, and make a decree for the plaintiff for Rs. 58,278 and interest as given by the award, and costs of the suit in that Court, but inasmuch as the defendant had the opinion of the Third Division Court in his favour, we direct that the parties respectively shall bear their own costs of the appeal.

Attorneys for the plaintiff: Leathes and Crawford.

Attorney for the defendant: R. V. Hearn, Government Solicitor.

[APPELLATE CIVIL JURISDICTION.]

1872.
May 1.*Appeal under Letters Patent, No. I. of 1869.*

THE COLLECTOR OF AHMEDABAD *Appellant.*
 SA'MALDA'S BECHARDA'S *Respondent.*

Tálukdári village—Purchaser from Tálukdár—Bombay Act VI. of 1862
—Res judicata—Decision by default—Civ. Proc. Code, Sec. 246—Ali-
nation of Tálukdári village.

Held that the *tálukdári* Act (Bombay Act VI. of 1862) did not affect *tálukdári* villages, the right, title and interest of the Tálukdár in which had been sold before that Act came into operation, though possession of such villages had not then been obtained by the purchaser.

S., the mortgagee of a *tálukdári* village, obtained a decree upon his mortgage against his mortgagor, the *tálukdár* of the village, under which S. attached the village. The Collector of the District, in which the attached village was situated, thereupon came in under Section 246 of the Civil Procedure Code, and sought to raise the attachment, but, as he failed to appear when the matter came on for adjudication, his application was dismissed.

The village was then sold under the decree and was purchased by S., the mortgagee.

Upon S. seeking to obtain possession of the village, he was resisted by the Collector, whereupon S. (after proceedings ineffectually taken by him under Sec. 269 of the Code) filed a suit against the Collector praying to be put in possession of the village :—

Held by the Appellate Court (affirming the decision of Tucker, J.) that the right of S. to be put *in possession* of the village was, as between him and the Collector, *res judicata* by reason of the dismissal of the Collector's application under Sec. 246 of the Code (to set aside which dismissal the Collector had not filed a suit within the year allowed for that purpose), and that S. ought, therefore, to have been at once put in possession of the village without further proof of his title.

As to the right of Tálukdárs in the Ahmedabad Zilla to alienate their *tálukdári* villages—*Quære.*

THIS was an appeal, under Sec. 15 of the Letters Patent; from the decision of Tucker and Gibbs, JJ., made in Special Appeal No. 284 of 1867.

The facts fully appear from the judgment of the Appellate Court.

At the hearing of the special appeal, Tucker and Gibbs, J.J., were both of opinion that Bombay Act VI. of 1862 had

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no application to the case, and that the plaintiff had not entered into any agreement with the Tálukdári Settlement officer which deprived the plaintiff of his legal rights.

Tucker, J., was of opinion that the defendant, the Collector, had lost his remedy and was prevented from disputing the plaintiff's right to take *immediate possession* of the village under the certificate of sale granted to the plaintiff, on the 25th of July 1862, under Sec. 259 of the Civil Procedure Code, in consequence of his (the defendant's) failure to file a suit to establish his right within a year from the date (10th August 1861) when the Munsif had rejected the claim which the Collector had preferred for the release of the village from attachment under Sec. 246 of the Code. As to the effect of the plaintiff's being so put in possession, Tucker, J., said :—

My learned colleague considers that as the Collector is in possession now and the plaintiff has brought this suit to eject him, the question of the forfeiture of the judgment debtor's estate should be determined in this suit, and that the suit should be remanded that this question may be gone into and decided by the Lower Courts. It appears to me, however, that the plaintiff would be greatly prejudiced by this proceeding, as the burden of proof will be on him instead of the Collector, as it should have been, if the Munsif had acted rightly in dealing with the applications and counter applications made to him in 1861. If the word "right" used in the latter part of Section 246 be interpreted as meaning simply the right to possession, as contra-distinguished from a title to recover, it may be that the Collector will have a right, after plaintiff shall have been put in possession, to sue to establish the forfeiture of the estate of the original judgment debtors to the Government in consequence of its attachment and sale. I wish to express no decided opinion on this point, as I am of opinion that it cannot equitably be raised and adjudicated upon in the present action, and I hold that the plaintiff's present suit should be considered and treated simply as a suit for possession to which he is entitled, inasmuch as the estate, when it was put up for sale, was substantially adjudged

to be in the possession of the judgment debtors and not of the Collector, the present defendant. This will place the parties in their proper positions if the Government be still disposed to contend that the estate has lapsed in consequence of its transfer by sale, and that it has not been precluded by the Collector's default in 1861 from claiming the benefit of this lapse.

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I would reverse the decrees of both the Lower Courts and direct that the plaintiff be put in possession of the Tálukdári village of Kathini Aniali mentioned in the plaint, and that the defendant pay all the plaintiff's costs in all courts.

Gibbs, J. (on this point said):—

It, therefore, remains to see what course this Court should adopt regarding the disposal of this special appeal. My learned brother wishes to give a decree against the defendant on the ground that the matter is *res judicata* and that, therefore, he cannot defend the action. This requires me to go more fully into the matter of the application by the Collector under Section 246 which is above alluded to, and to see how the rejection by the Munsif of the Collector's application affects the present suit.

The application made by the Collector under Section 246 of the Civil Procedure Code was to the effect that the lands were not liable to be sold in execution against the defendants, the Tálukdárs.

This matter was disposed of by the Munsif's order of the 10th August 1861, which, although it only dismissed the Collector's application, must, I think, be considered as deciding that the lands *could be* sold in execution of the decree; and this is all that is *res judicata* under this order. Now, since then the sale has taken place, and the purchaser seeks possession; although he is the same person who was the judgment creditor, he comes before us as it were in a new capacity,—the owner of the judgment debtor's right, title, and interest in the land, and the Collector also now appears in a new light, viz., as actually in possession of the estate. How he got into possession, we do not know; but

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that he is in possession and opposes the plaintiff having the estate made over to him is clear by the plaint, and I cannot, under these circumstances, so different from those under which the miscellaneous application under Section 246 was decided, hold that the order of the 10th August 1861 disposes of this matter. Plaintiff has chosen to bring what is really an action of ejectment against the Collector who is in possession of the estate, and this, as it appears to me, can only be decided by an inquiry into title, and as this has not been done, I consider the District Judge's decree should be reversed, and the case remanded for retrial on its merits.

The appeal was argued before WESTROPP, C.J., LLOYD and MELVILL, JJ.

Mayhew, Legal Remembrancer (with him *Dhirajlál Mathurádás*, Government Pleader) for the appellant.

McCulloch (with him *Nánábhái Haridás*) for the respondent.

Cur. adv. vult.

May 1st, WESTROPP, C.J. :—The plaintiff, as mortgagee of a *tálukdári* village*, obtained against his mortgagors, the *Tálukdárs*, on the 22nd of March 1860, a decree, from the Munsif's Court at Dhonduka, for Rs. 4,162-10-3 to be realized by sale of the village, under which decree the village was attached with a view to a sale, on notice of which attachment the Collector, in June 1861, presented a petition, under Sec. 246 of the Civil Procedure Code, seeking a removal of the attachment and prevention of the sale. On that petition the following order was made :—" 10th August 1861. In this case the petitioner obtained time for the production of evidence. The said time expired to-day, but neither the petitioner, nor a *Muktiár*, nor *Vakil*, on his behalf, appears before the court. Such being the case, no inquiry is made in regard to the petition, and it is ordered that the petition be rejected and that the petitioner should pay the defendant's costs one rupee." After due proclamation the right, title, and interest of the *Tálukdárs* (the mortga-

* Kathini Aniali, Parganna Rampur.

gors) in the mortgaged premises (the village) were sold by the Munsif's Court on the 30th of September 1861, the mortgagee himself (plaintiff) becoming the purchaser for Rs. 2,000. The sale was confirmed under Sec. 256 of the Civil Procedure Code. On the 30th January 1862, the plaintiff applied to be put into possession, whereupon the Munsif entered into an irregular correspondence with the District Judge, the Collector, and the Tálukdári Settlement Officer. Eventually the Collector, under Sec. 269 of the Civil Procedure Code, opposed the giving of possession to the plaintiff. While the inquiry under that section was pending, the Bombay Government, on the 3rd February 1863, by proclamation under Bombay Act VI. of 1862, purported to vest the management of the village in question together with other property of the Tálukdárs in the Tálukdári Settlement Officer. The Munsif thereupon, on the 18th of February 1863, endorsed an entry or order on the papers, relating to the proceedings under Sec. 269 of the Civil Procedure Code, to the effect that Bombay Act VI. of 1862 having been applied to the village, his jurisdiction had terminated.

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On the 15th of February 1864, *i.e.*, within a year after the date of that entry or order, the plaint in the present suit was filed by the plaintiff, the purchaser, against the obstructing party, the Collector, to obtain possession of the village.

The Collector filed a written statement in defence, alleging (1) that the plaintiff had agreed with the Tálukdári Settlement Officer to forego his claim to the village on receiving Rs. 3,868-12-6, an amount the payment of which Government had sanctioned, and the Mámlatdár had been ordered to pay to him; (2) that this suit was prohibited by Bombay Act VI. of 1862; (3) that the plaintiff's father being a Desái, the plaintiff acted improperly in purchasing a *tálukdári* village; (4) that a *tálukdári* village or estate was, by the terms of the lease on which it was held, and according to the preamble of Bombay Act VI. of 1862, inalienable.

The Acting Assistant Judge framed two issues, but only arrived at a finding on the first of them, namely, "Had the

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original Tálukdárs any right to sell their right of management (*vahirdt*) or not?" This he found in the negative upon a document (exhibit No. 28) produced by the Collector which has been called a lease and has been alleged to have been binding on the Tálukdárs, the 7th paragraph of which contained the following passage:—"Till the time mentioned in this lease expires (ten years), the Government is to sanction the management of the village by us. If we be deprived of the management, upon attachment, either by order of the Collector, for arrears of revenue, or on *civil process at the suit of our creditors*, this management is to pass out of our hands into those of Government." The Acting Assistant Judge, being of opinion that the management of the village was inalienable without the sanction of Government, made, on September 6, 1864, a decree for the defendant with costs.

The plaintiff preferred a regular appeal against that decree to the District Judge, who framed two issues, but came to a finding upon one of them only, namely, "Act VI. of 1862 having been applied by Government to the *tálukdári* estate containing the village in dispute, can the Civil Court entertain the appellant Sámaldás's claim to be put in possession of it?" which issue the District Judge found in the negative, saying: "Once the Tálukdári Act has been made applicable to an estate, all judicial proceedings are to be stayed (Sec. 2), and the estate cannot be attached by any Civil Court (Sec. 5), and as in the present case the Act was put in force with the consent of the plaintiff, I am of opinion that he has no right either legally or morally to ask for the intervention of the Civil Courts in his favour." The District Judge accordingly affirmed the decree of the Acting Assistant Judge with costs, but, as has been seen, on grounds different from that on which the latter had proceeded.

Against the decree of the District Judge, the plaintiff specially appealed to the High Court. The special appeal was heard by a Division Court consisting of Mr. Justice Tucker and Mr. Justice Gibbs. They concurred in holding that the Tálukdári Act VI. of 1862 (Bombay) could not

affect the case, inasmuch as the Tálukdárs' right, title, and interest, in the village had been sold to the plaintiff and the sale had been confirmed before the Act was passed, which sale, moreover, had been made, notwithstanding an effort by the Collector to raise the attachment and stop the sale by an application under Sec. 246 of the Civil Procedure Code, which application was dismissed for want of prosecution on the 10th of August 1861. The Act received the assent of the Governor General upon the 1st of September 1862, and was promulgated by the Bombay Government on the 14th of October 1862. In the opinion of those learned Judges, that the Act had no application whatever to the case of this village, we fully agree. If, on the one hand, the Tálukdárs had an alienable and saleable estate in the village, it had, by the court sale, passed to the plaintiff before the Act came into force. If, on the other hand, as has been contended before us, the estate of the Tálukdárs became, under the terms of the alleged lease, wholly forfeited to Government on the attachment being placed upon it by the Civil Court, their estate had ceased to exist before the Act was passed. In either case, there would not be any interest in the village on which the Tálukdári Act could operate at the time when Government by its notification purported to place the village together with the rest of the Tálukdárs' estate under the Act.

The learned Judges also held that a completely erroneous view had been taken by the District Judge of what took place between the plaintiff and the Tálukdári Settlement Officer. The plaintiff by a petition (exhibit No. 9), presented to that officer, in substance stated that for a payment of Rs. 9,000, the amount of debts due to the plaintiff by the Tálukdárs, he would be willing to waive his purchase of the village and right of possession, but added also that he would not file a *rāzināmá* until his proposal was accepted. His proposal never was accepted, as the officer, being of opinion that Rs 3,868-12-6 only were due from the Tálukdárs to the plaintiff, offered him no more than that sum. Mr. Justice Tucker and Mr. Justice Gibbs ruled that under such

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circumstances it was impossible to hold that the plaintiff consented to the bringing of the village under the Tálukdári Act. In that opinion we concur, and must express our surprise that any person should have contended that an opposite construction ought to be placed upon the conduct of the plaintiff.

Mr. Justice Tucker further held that the right of the plaintiff to possession at least became *res judicata* by the dismissal of the Collector's application under Sec. 246, and that the Munsif ought summarily to have placed the plaintiff in possession, and, therefore, that the plaintiff ought by a decree in this suit (which the learned Judge regarded as one for possession merely), to have been placed in the position in which the Munsif ought to have placed him, this suit having been brought pursuant to Sec. 269 to rectify the erroneous order of the Munsif made in the proceedings founded on that section. Mr. Justice Tucker said: "This will place the parties in their proper positions, if the Government be still disposed to contend that the estate has lapsed in consequence of its transfer by sale, and that it has not been precluded by the Collector's default in 1861 from claiming the benefit of this lapse." The learned Judge, therefore, ruled that the decrees of both of the lower courts should be reversed, that the plaintiff should be put into possession of the village, and that the defendant should pay the costs of the suit and both appeals.

On that point, Mr. Justice Gibbs differed from Mr. Justice Tucker, being of opinion that the right of the plaintiff to recover the lands was not a *res judicata* by the order of the Munsif under Sec. 246, and that the plaintiff should be required to prove his title independently of that order, and therefore, that this cause should be remanded for retrial on the merits.

Mr. Justice Tucker being the Senior Judge, the decree was made in accordance with his view.

Against that decree the defendant has appealed to a full court under Sec. 15 of the Letters Patent of December 28,

1865, which appeal has been heard by my brothers Lloyd and Melvill and myself. 1872.

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In support of the view taken by Mr. Justice Tucker, on the only point on which he and Mr. Justice Gibbs differed, is the case *in re Bance Madhub Roy (a)* in which it was held by Norman and Mitter, JJ., that where an application under Sec. 246 had been disallowed on the ground of unnecessary and improper delay, and the attached property had been sold, and in the attempt of the purchaser to take possession he had been obstructed by the unsuccessful applicant under Sec. 246, and thereupon an investigation was held under Sec. 269, the Civil Court rightly determined that the rejection of the claim under Sec. 246 was fatal to the right of the applicant, under that section, to possession. There is also a case of *Shaik Khoda Buksh v. Purmanund Dutt (b)* which shows that an order, made on default, dismissing a claim under Sec. 246, is as efficient as an order made after investigation, and that consequently the limitation of one year applies to the former as well as the latter.

The Tálukdárs were in possession until the attachment was placed upon the village. Subsequently thereto, but at what time precisely does not appear, the Collector was permitted by the Tálukdárs to take possession. Whether this occurred before or after he made his application under Sec. 246, or his abandonment of that application was occasioned by his not then being in possession, is not in evidence. One point, however, is quite manifest, and that is that the Tálukdárs here are, through the Collector, resisting their creditor, the mortgagagee, who has passed from the character of creditor and mortgagagee into that of purchaser so far as regards this village, and that the yielding up of the possession to the Collector is part and parcel of that contest, and was done with a view to defeat their quondam creditor the purchaser. It is, therefore, a transaction within the spirit, if not within the letter,

(a) 13 Calc. W. Rep. Civ. R. 431.

(b) I. Wyman Rep. 280; S. C. 5 Calc. W. Rep. Civ. R. 214,

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of Sec. 240 of the Civil Procedure Code. We cannot doubt that a surrender, by deed, of the village, executed by the Tálukdárs to the Collector while the village was under attachment, would be void as against the creditor. We think that Mr. Justice Tucker was right in holding that the court ought not to suffer the purchaser by such a proceeding to be placed in a worse position for the defence of his rights under the sale, whatsoever they may be, than he would have been, if the Munsif had done what the case, which we have above cited from 13 Calc. W. Rep. Civ. R. 431, shows to have been his duty, and that this action has been properly brought to remove the consequences of the Munsif's error.

But our decision does not rest upon that ground alone. With regard to the question of title, we are bound to observe that Government has estopped itself, and, therefore, estopped its officer and representative in this suit, the Collector, from maintaining that the estate of the Tálukdárs in this village has been forfeited, under the terms of the alleged lease, by the attachment and sale. So far from treating the estate in this village, which had been once vested in the Tálukdárs, as forfeited and extinct, and from claiming the village as having thus lapsed to the Crown, Government, by the notification already mentioned, made subsequently as well to the attachment as to the sale, attempted to place the village (together with the rest of the Tálukdárs' estate) under the operation of the Tálukdári Act. That Act was not passed with the intention of, and furnishes no means for, enforcing forfeitures to Government, occasioned by the non-performance of conditions in what have been called leases from Government to the Tálukdárs, but for the purposes of relieving the Tálukdárs of their debts by vesting the management of their estates temporarily in an officer of Government, who is, during that period of management (which could not in any case exceed twenty years—Sec. 16), to make an allowance out of the annual income of the estate for the decent support of the Tálukdár and his family, and to apply the balance towards the liquidation and settlement of his debts and liabilities. The Act never was meant

by the Legislature to be converted into an engine for enforcing forfeitures, and we have no suspicion that Government ever intended to, or would, apply it for such a purpose. By the notification, whereby Government attempted to place this village under the Tálukdári Act, Government not only treated the estate of the Tálukdárs as still subsisting, but must be regarded as admitting that, after the period of temporary management had expired, the management should be restored to the Tálukdárs and that they should be the absolute proprietors thereof subject to land tax (Sec. 20).

If, therefore, the right to treat the estate of the Tálukdárs as forfeited by the attachment and sale, ever existed, that right has been completely waived and remitted.

Whether it would be possible for the Tálukdárs themselves, at the present stage of affairs, by any means to contest the alienability of the village in question, it is unnecessary for us now to say. They are not parties to this suit, and cannot here raise such a question. Whensoever they do so, the burden of the contest will lie upon them. We prefer at present not to give any opinion as to how far Government could sustain the recital contained in the preamble of Bombay Act VI. of 1862 that the Tálukdárs of the Ahmedabad Zilla then held their estates "on leasehold tenure determinable at the pleasure of Government," and that they could not "be lawfully charged, encumbered or alienated," the truth of which has been denied on the part of the plaintiff, and which is perhaps scarcely consistent with the concluding part of Sec. 7. We admit that "a mere recital in an Act of Parliament" (and therefore in a Bombay Act) "either of fact or law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital" [per Lord Campbell, C.J., in *Reg. v. Haughton* (c)]. In Bombay Acts, recitals of facts of a public nature are only *prima facie* evidence of the truth of those facts. See Bombay Act X. of

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BECHARDAS. 1866, Sec. 9. As to Acts of the Government of India, see Act II. of 1855, Sec. 9 (repealed by Act VIII. of 1868), Act I. of 1868, Sec. 8 (repealed by Act I. of 1872) ; and as to all Acts, see now Act I. of 1872. Sec. 37.

Some alarm was expressed by one of the learned Judges lest the definition of the term "Civil Court," given in Sec. 21 of the same Act, if *ultra vires*, inasmuch as it included courts established by Royal Charter, should invalidate the whole Act. We never could have participated in that alarm, as it is well-settled law that if an enactment be good in part and bad in part, and the bad be divisible from the good, the latter shall be regarded as valid and binding : *Reg. v. Laidie (d)*, *Blackpool Board of Health v. Bennett (e)*, *Reg. v. Faversham (f)*, Forsyth's Cases and Opinions 465, and see 8 Bom. H. C. Rep. Cr. Ca. 61. The effect of holding Sec. 21, Cl. 1 in purporting to exclude the jurisdiction of courts established by Royal Charter, to have been thus far *ultra vires* on the part of the Bombay Legislature, would have been simply to have left the jurisdiction of those courts untouched. The rest of the Act is most easily separable from that provision, and was, therefore, not in anywise invalidated by it. The question has, however, recently been settled by the Legislature of India : Act XV. of 1871, Sec. 26.

We are of opinion that the decree of Mr. Justice Tucker must be affirmed with costs.

(d) 8 Jur. N. S. 640, 641. (e) 4 H. & N. 137, 138 per Watson, B.
(f) 8 T. R. 352, 356.

[ORIGINAL CIVIL JURISDICTION.]

1872.
May 27.

THE JUSTICES OF THE PEACE FOR THE CITY
OF BOMBAY *Plaintiffs.*

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY. *Defendants.*

*Rates—Municipal ground rates—Railway Company's liability to pay
rates—Principle of rating—Owner—Occupier—Act II. of 1865 (Bombay)
—Act IV. of 1867 (Bombay).*

The Great Indian Peninsula Railway Company, which, under an agreement with Government, holds the land, upon which their Railway is constructed, free of rent for 99 years, are occupiers only, and not owners, of such land within the meaning of Section 2 of Bombay Act II. of 1865, and are therefore not liable to be rated as owners of the ground used by them for the purposes of the railway within the City of Bombay.

Principles upon which railway companies are liable to be rated considered and laid down.

THIS was a special case stated, under Sec. 328 of Act VIII. of 1859, for the opinion of the High Court. The material portions of the case stated that :—

By an indenture of agreement, bearing date the 17th day of August A.D. 1849, and made between the East India Company' of the one part and the Great Indian Peninsula Railway Company of the other part, wherein, amongst other things, it was stated that the said Railway Company had contracted, to make, maintain, and work a railway from Bombay to Callian, and to pay into the Treasury of the East India Company the sum of £500,000, to be, from time to time, drawn out for the purposes of the said railway, and that it had been agreed that the said railway, when finished, should be leased to the said Railway Company for the term of 99 years, subject to any breaches by the said Railway Company of certain conditions imposed on them in the said Indenture of agreement, the said East India Company covenanted, to obtain possession and to make over to the Railway Company

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free from all charges the land required for the said railway, for the said term of ninety-nine years, subject as aforesaid.

Since the making of such Indenture of agreement, the capital of the Railway Company has been increased, and by successive agreements made between the Government of India and the said Railway Company, like powers, as in the first-mentioned agreement, were granted to the said Railway Company, to extend the said railway from Callian aforesaid to other places in the Mofussil.

The Railway Company have since extended their line of railway, one terminus of which is at Borce Bunder in the Island of Bombay, the other termini being at different places in the Mofussil, to wit, Sholápur, Nágpur and Khundwah, and the Railway Company, since such first-mentioned agreement, have been, and now are, in possession and exclusive occupation of the same, as well as of sidings, stations, offices, store-rooms, goods-warehouses and other conveniences situated both in Bombay and various other places along the said railway between Bombay and the various termini in the Mofussil before mentioned.

In the year 1855, the assessing officer, under and by virtue of the Stat. 33 Geo. III., Chap. 52, Sec. 158, assessed the said Railway Company at the sum of Rs 3,750 in respect of houses, buildings and ground owned and occupied by them within the City and Town of Bombay, and from that time to the year 1870 inclusive, each and every year was the said Company duly assessed. The assessment for the present year (1869) was made under the provisions contained in Act II. of 1865 and Act IV. of 1867.

The said Railway Company have always maintained that the ground occupied by their railway within the city of Bombay, has no assessable value, as they are not the owners of the same nor have they any title thereto; but on the contrary, that the same is owned by and vested in the Government of India, as appears from the letters which passed between the Solicitor of both the Government and the Railway Company.

The following questions were submitted to the court for its opinion :—

1st.—Is the G. I. P. Railway Company liable to be rated as owners for the ground used by them for the purposes of the railway within the city of Bombay ?

2nd.—If so, upon what principle is the assessment to be made ?

3rd.—The Railway Company admitting that they are liable to be rated as occupiers of land, upon what principle are they to be rated as such ?

The case came on for argument before Couch, C.J., and Westropp, J. *

Atkinson, Serjeant, *McCulloch*, and *Green* for the plaintiffs.

Marriott and *Latham* for the defendants.

Cur. adv. vult.

27th May—WESTROPP, C.J. (after reading the special case as stated above, proceeded) :—This special case, as I have stated it, is the amended case which was filed in March 1870, and not the case originally presented, and which was of a much more extended nature.

This case, it will be observed, has no reference to stations, houses, buildings, &c. Upon those the Railway Company have, for several years past, paid rates. It relates to ground only.

As to the first question, I have come to the conclusion that the Railway Company are not liable to be rated as “owners,” in respect of the ground used by them for the purposes of the Railway.

The indenture of agreement of the 17th August 1849 appears to me to vest in them a right to occupy the land for ninety-nine years, determinable under the circumstances set forth in that indenture. The occupation is only for certain purposes, the absolute dominion over the land not being given to the Railway Company.

* After the arguments of the case had been heard and before the judgment was delivered, Couch, C.J., was appointed to the Chief Justiceship of Bengal, and Westropp, J., was appointed Chief Justice at Bombay.

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Such was the nature of the transaction that there has not been any rent reserved to Government, but if rent had been reserved, Government, in whom the reversion is vested, would alone have been entitled to receive it.

It was not, I think, intended that the definition of "owner," contained in Section 2 of the Act, should have been applied to one who himself is a lessee, or who holds, as the Railway Company does here, under an agreement to grant him a right of occupancy for specific purposes for a term of years, and who sublets to another. This remark is made by me with reference to the words in the definition, "or who would receive the same if such land or premises were let to a tenant."

There would be some difficulty in contending that the Railway Company has any right to sublet; but, even if it had, I do not think that a party who sublets was intended to be included in the definition of "owner."

In fact we find that Sec. 48 draws clearly a distinction between owners and tenants who sublet, applying to the party alone who makes the first letting, the term "owner," and to his lessee who sublets, the term "tenant"; and albeit that Sec. 48 deals with houses and buildings only, the argument as to the proper use of the term "owner" is not thereby weakened. The true mode of construction of enactments is, if it be reasonably possible, to give to a word the same construction throughout the enactment, unless there be something in the context repugnant to that construction. I see nothing in the context to render it imperative upon the court to hold that the term "owner" in Sec. 2 of the Act necessarily includes a lessee. The definition of owner in that section is perhaps not a very happy one, but the legislature itself by Secs. 47 * and 48 has greatly aided that definition, and showed that the rent spoken of in Sec. 2 means rent receivable, or which might be

* NOTE :—Sec. 47 has been repealed and a somewhat similar enactment substituted for it—Bombay Act IV. of 1867, Sec. 1, which does not alter the argument.

receivable, under an original letting, and not a subletting ; otherwise, indeed, every temporary occupier who sublets would become an owner and liable to be rated in that capacity—a result which it would not be reasonable to hold as within the intention of the legislature without some more clear declaration of it than can be discovered in the Act.

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Government appears to me to be the owner of the land, but I am not in anywise called upon, on the present occasion, to determine what its liability may be, and I do not intend to offer any opinion upon that point. I hold that the Railway Company are not owners within the scope of the Act.

2. The Railway Company admits its liability as “occupiers.”

The principle, upon which the Railway Company is liable to be rated as occupiers, is to take the gross earnings of the portion of the line which is within the city (Island) of Bombay and to make therefrom the following deductions :—

1. The expenses of working that portion of the line ;
2. The repairs of rolling stock, &c., used on that portion of the line ;
3. An allowance for renewal of it ;
4. An allowance for a compensation fund ;
5. Interest upon the capital necessary for working that portion of the line ;
6. Tenant's profit on that capital.

A deduction in respect of income-tax has also been claimed on behalf of the Railway Company, and in support of that claim *Reg. v. The Great Western Railway Company* (a) has been cited. But that case has been, in that respect, overruled by *Reg. v. The Southampton Dock Company* (b), upon satisfactory grounds. I must hold that income-tax is not a proper deduction.

(a) 6 Q. B. 179, 205.

(b) 14 Q. B. 587, 611.

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If an allowance be made for depreciation of rolling stock, the fact of such an allowance having been made should be taken into consideration in fixing the rate of tenant's profit.

The letter of the 23rd March 1870, appended to the amended special case and marked A, appears to have erroneously adopted the now exploded mileage principle. The principle to be adopted here is that which, in England, is known as the parochial principle.

The figures in this case will, according to the terms arranged between the parties, be worked out by their mutual referee, Mr. Ormiston, upon the principles laid down in this decision.

The parties will, up to this stage, bear their own costs respectively.

L. 13 Bom. f. 130.

[APPELLATE CIVIL JURISDICTION.]

June 17.

Special Appeal No. 118 of 1870.

THE GOVERNMENT OF BOMBAY *Appellant.*
 GOSVAMI SHRI GIRDHARLALJI *Respondent.*

Reg. V. of 1827 Sec. I., Cl. I.—Allowance not incidental to hereditary Office—Prescriptive right.

In considering with reference to prescription whether an allowance (not being incidental to an hereditary office) is or is not immoveable property, the High Court has generally followed the test :—"Is or is not the allowance a charge upon land or other immoveable property?"

Where an allowance by Government is neither incidental to an hereditary office nor a charge upon immoveable property and is not supported by a grant from Government, the enjoyment of it for thirty years does not create a prescriptive title to its continuance under Regulation V. of 1872, Section I., Cl. I.

THIS was a special appeal from the decision of the District Judge at Súrát, in Appeal Suit No. 138 of 1869, confirming the decree of S. H. Phillpots, the Assistant Judge.

The appeal was argued before LLOYD and MELVILL, JJ.

Dhirajlál Mathurádás, Government Pleader, for the appellant.

Shántúrám Náráyan for the respondent.

The facts of the case and the arguments on each side sufficiently appear from the following judgments :—

MELVILL, J.:—This is a suit to establish the liability of Government to pay in perpetuity an annual allowance of Rs. 20-11-5, and to recover arrears of the same allowance.

The allowance in question was a contribution to the expenses of a temple at Kakroli, a place beyond the British territory. It was originally paid out of the revenue of the village of Kusad, in the Praganá of Ulpár, which was acquired by the British Government from the Peshwa in 1817. From that date up to 1854, the allowance was regularly paid by the village authorities, and was afterwards disbursed from the Mámlatdár's treasury. In 1866, the Government refused to make any further payments.

The plaintiff has not produced any *sanad* granted either by the present or the former Government. He relies upon his long enjoyment as constituting a prescriptive title ; and the statutory provision, on which he founds his claim, is that contained in Clause 1 of Section 1 of Regulation V. of 1827.

The allowance is not incidental to any hereditary office ; and the plaintiff, therefore, has to show that it is immoveable property within the meaning of the section above referred to.

The courts below have awarded the plaintiff's claim, on the ground that it has already been decided by this court in Special Appeal No. 21 of 1868 (a) that where a charitable allowance, in connection with a temple, was proved to have been enjoyed by the incumbent, and those under whom he held in regular succession, for more than 30 years, the grantee had acquired a right of property in it under Section 1 of Regulation V. of 1827. That case is no doubt exactly in point ; but the learned Judges, who decided it, appear to have based their judgment on the previous case of *Desái*

(a) 5 Bom. H. C. Rep. A. C. J. 23.

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1872. *Kallianrái v. The Government of Bombay* (b), the authority of which has been greatly weakened, if not entirely destroyed, by the judgment of the Judicial Committee of the Privy Council in appeal*. It follows that the precedent, on which the Lower Courts have relied, can furnish no guide for our decision.

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The plaintiff's case was argued at great length, and very ably, by Mr. Shántarám Náráyan, who, in addition to the two cases above referred to in the fifth volume of the Reports, adduced certain other decided cases, and relied generally on the definitions of immoveable property given by writers on Hindu law.

Most of the cases cited had reference to hereditary offices and allowances incidental to such offices. These cases may be at once dismissed from our consideration, for hereditary offices are distinctly specified as immoveable property in Section 1 of Regulation V. of 1827, and a Full Bench of this court has recently decided in Special Appeal No. 238 of 1871 (c) that allowances incidental to such offices are immoveable property within the meaning of Act XIV. of 1859. The only case, which really tells strongly in the plaintiff's favour, is that of *Bhawani and others v. Hasan Miya* (d), in which it was held (Tucker J. *dissentiente*) that the recipients of an annual allowance for upwards of a century had acquired a good title to the allowance by prescription. If it be a necessary deduction from that decision that any person, who has been in receipt of any kind of allowance for a period of 30 years, acquires a prescriptive right to a continuance of such allowance, then, I must express a most decided dissent from a doctrine which would, as observed during the argument in this case, strike at the root of all charities. It is not very clear on what principle the case was decided; but it does not appear from the report that there was any argument on the question whether or not the allowance in dispute came within the definition of immoveable property.

(b) *Ibid.* 1.

(c) 9 Bom. II. C. Rep. 99.

(d) 1 *Ibid.* 45.

* See this judgment printed at the end of the case.

In considering, with reference to limitation, the question whether any particular allowance (other than an allowance incidental to an hereditary office) is or is not immoveable property, this court has, I think, generally, if not invariably, applied the following test, viz., is or is not the allowance in question a charge upon land or other immoveable property? *Bharatsangji Mansangji v. Navanidharaya Munsukhram (e)*; *Maháráná Fatesangji v. Desái Kalliánrai (f)*; *Ráiji Manor et al v. Desái Kalliánrái (g)*. And from the report which has just reached us of the judgment of the Judicial Committee in the appeal of the *Government of Bombay v. Desái Kalliánrái*, it appears that their Lordships would apply the same test in the construction of Section 1 of Regulation V. of 1827. "Their Lordships," they say, "are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the respondent had, under the provisions of the Bombay Regulation No. 5 of 1827, Chapter 1, Section 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunnah, can properly be said to be 'immoveable property' within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or since 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dawlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury."

The propriety of the test indicated by the above decisions seems to me to be borne out by the authorities on Hindu Law. Sir T. Strange (Volume 1, page 16) says:—"Real or immoveable property among the Hindoos includes, besides land and houses, slaves attached to the land, and annuities se-

(e) 1 Bom. H. C. Rep. 186. (f) 4 Bom. H. C. Rep. A. C. J. 189.

(g) 6 Ibid 56.

1872. cured upon it, the latter bearing a close resemblance to that species of incorporeal hereditament which we call *corodies*.”

THE GOVERN- Macnaghten (page 1) and Grady (p. 74) define corodies in
MENT OF
BOMBAY a similar manner. Mr. Shántarám has labored hard to prove
v.
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SHRI GIRD- as to include other grants than those secured upon immove-
HARLA LJ. able property. The texts bearing upon the subject have
been set forth at length in the recent judgment of the Full
Bench in Special Appeal No. 238 of 1871 (*supra*), and it is
unnecessary to reproduce them here. It is impossible to
read them without seeing that the definitions of the term
“corody,” which they contain, involve generally the idea of a
connection with immoveable property. It is described as “a
fixed pension receivable out of mines or the like;” “so many
leaves receivable from a plantation of betel, pepper, or so many
nuts from an orchard of areca” and so on. It is true that
some of the definitions are more vague and comprehensive.
Thus “a corody is a gift in this form—‘I will give a hundred
Suvarnas every month of Kartiki,’ or ‘out of this mine, of
this village, I will annually give a hundred Suvarnas.’”—“A
corody (*nibandha*) signifies a permanent allowance received
from saleable articles in virtue of an agreement or promise.”—
“Any thing which has been promised, deliverable annual-
ly or monthly or at any other fixed periods.” These pass-
ages may perhaps tend to show that certain allowances not
secured upon land may, for purposes of descent, be included
in the term “corody,” and rank with immoveable property.
But it is clear from them that in order that such property
should attain this distinction, it should be shown to be deriv-
ed from some express and solemn agreement or promise
made by the king or other person in authority. “Let a king,
having given land, or assigned a corody, cause his gift
to be written for the information of good princes, who
will succeed him, either on prepared silk or on a plate of
copper, sealed above with his own signet. Having described
his ancestors and himself, the quantity of the gift, with
the penalty of resumption, and set his own hand to it
and specified the time, let him render his donation

firm." It may be that an allowance, of whatever description, if thus solemnly promised, would come within the definition of a corody, and that it would descend, and its alienation be restricted in the same manner as immoveable property. But it is unnecessary to decide that point in the present case, in which the question is whether an allowance, unsupported by any promise or grant whatever, is immoveable property.

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Although the allowance was paid for many years out of the revenues of a particular village, the various descriptions of it in the accounts as "Sálábád bhet" (Exhibit 34), "gaum kharch" (Exhibit 35), "gaum Sadar kharch" (Exhibit 36 @ 39), do not indicate that it was a charge against the land. These expressions, as appears from Mr. Mountstuart Elphinstone's Report on the territories conquered from the Peshwa (p. 19), show that it was paid, not out of the land revenue, but out of a contingent fund raised by means of a tax on the villagers. After 1854, it was paid from the Mámladár's Treasury. Thus, to apply the expressions of the Judicial Committee, it never constituted a charge which could be enforced against the land or against the revenues of the land prior to the claim of Government. The utmost right, which there could be, would be the right to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Treasury.

Reference has been made in the course of the argument to the proclamation issued, on the 11th February 1818, by Mr. Mountstuart Elphinstone in regard to the territories conquered from the Peshwa, which contains the following passage:—"All Watans and Inams (hereditary lands), Wurshasans (annual stipends) and all religious and charitable establishments, will be protected and all religious sects will be tolerated, and their customs maintained, as far as is just and reasonable"—(Thomas's treaties, page 541). No argument was founded on this proclamation in the courts below; and if it be within our province to express any opinion on the subject, it is sufficient for me to say that the Govern-

1872. ment appears to me to act neither unjustly nor unreasonably
 THE GOVERN- in refusing to contribute to the expenses of a foreign temple.
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On the grounds that the allowance claimed is neither incidental to an hereditary office, nor a charge upon immoveable property, nor supported by a grant from the present or former Government, I hold that the allowance in question is not immoveable property, and that enjoyment by the plaintiff for 30 years does not create a prescriptive title to its continuance. I would, therefore, reverse the decrees of the courts below with costs on special respondent throughout.

LLOYD, J. :—I also am of opinion that the authorities that have been referred to in the course of the argument do not justify us in holding that the charitable allowance claimed is “immoveable property” within the meaning of Clause 1, Section 1, Regulation V. of 1827; and as the claim is based solely on the alleged prescriptive title, which thus fails, I concur with my learned colleague in reversing the decrees of the courts below.

Decree reversed.

THE appeal in the case of the *Government of Bombay v. Desai Kallianrai* alluded to in the foregoing judgment was argued before Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier. The judgment of the Privy Council was on the 20th April 1872 delivered by Sir James P. Colvile, J. :—

The question raised by this appeal was whether the respondent has an hereditary right to receive, out of the public revenues of the Presidency of Bombay, an annual allowance of Rs. 1,274-4-2, notwithstanding an order of the Government, dated the 28th November 1861, which declared it to be a mere personal allowance, and as such resumable, and that it was to cease on the death of the then recipient, the respondent's father.

The respondent is Desai of the Pergunnah of Broach. His office, once important, is now a mere sinecure, its functions being exercised by other officers. But such as it is, it is

admitted to be held by him, together with an Inam village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of Desai, nor is it held by the same title as the village. His case as to it is that upwards of a century ago, the then native ruler of Guzerat conferred upon one of his ancestors, and predecessors in the office of Desai, as a reward for distinguished service, the grant of a Palkhi or Palanquin, together with the allowance in question, the latter being the sum fixed for the Palkhi expenses, and charged on the land revenues of the Pergunnah of Broach. He alleges that this grant was confirmed by the different dynasties who have since ruled in Guzerat, and finally by the British Government in 1808 ; and he insists that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

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The case made by the Government in answer to this claim, as stated at page 10 of the Record, is that the Palkhi right was not granted for Desaiship service ; that it is not of the nature of an ordinary Inam ; that it was granted to the original holder personally, and was liable to cease on his death ; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so.

The Zillah Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit ; his decision was reversed, and a decree made in favour of the respondent by a Division Bench of the High Court of Bombay ; and the present appeal is against that decree.

The grounds of the judgment of the High Court are thus summed up by Mr. Justice Tucker : " I consider then that the plaintiff is entitled to succeed in this suit (1) because, in the absence of the original deed of conveyance or grant, the long enjoyment of plaintiff's ancestors, during four genera-

1872. tions successively, and for a period of more than a century,
 THE GOVERNMENT OF BOMBAY creates a legitimate presumption that the allowance was conferred on the original grantee and his heirs ; and (2) because
 v. the uninterrupted enjoyment of plaintiff's grandfather and
 GOSVA'MI father, under the order made by the Government of Bombay
 SHRI GIRDHARLALJI. on the 7th February 1808, which extended from that date to 1856, gave to the plaintiff a statutory and undefeasible title."

Their Lordships propose to deal, in the first instance, with the second of these propositions ; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which Broach forms part was annexed, with the rest of Guzerat, to the Mogal Empire, by Akbar in 1572, and, from that time to 1685, was governed by a Nawab or Soubahdar. The sovereignty over it then passed to the Mahrattas, and seems to have been exercised by the Gaicowar until 1772. In that year, Broach was taken by the British, and was held by the East India Company until 1788, when it was ceded to Scindia. That Mahratta power held it until 1803, when it finally became British territory, under one of the treaties concluded with Dowlut Rao Scindia. The office of Desai appears to have been held by the respondent's ancestors during all these changes of dynasty. His grandfather, Dawlutrai, was found in possession of it by the British in 1803, and, it would appear from the Exhibits C. 42, C. 43, and C. 44 (pp. 39 to 41 of the Record), continued to receive the emoluments of office which he had previously received (including for sometime the Palkhi allowance), but subject to the condition of submitting to the orders which the Government of Bombay might pass respecting any increase or reduction of them. On the 31st of May 1807, the Revenue Commissioners at Broach made their report to Governor Jonathan Duncan, upon several matters previously referred to them,

which included the claims of the Desais in the territories in question. That document was not produced in the court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the Supplemental Record, and has been treated as part of the evidence in the cause.

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One of the papers forming the Appendix to this Report, No. 51, is entitled "Statement of the Income assigned to the Desais of the Broach Pergunnah, as taken from separate statements given in by each under their respective signatures." From this it appears that what Dawlutrai claimed was an Inam village under a grant to his ancestor, Khushalrai, from the Gaicowar, in A.H. 1140, corresponding with 1727-8; the Palkhi allowance in question; rights in certain Passaita land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of the Report were (para. 34) that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of Desai Dawlutrai's family to the Inam village should be acknowledged; and that they should, for the present, be allowed to hold their Passaita land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the Palkhi allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i.e.*, those fees and emoluments) as Government may be of opinion they (the Desais) have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated, from the accompanying Statements, Nos. 51 and 52, and a percentage in proportion allowed to them on the Government land revenue, which should be made payable to them from the Collector's office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action, which the Government of Bombay took on

1872 this report, is shown by the 16th paragraph of a letter, dated
 THE GOVERN- 7th February 1808, which is set forth at page 50 of the
 MENT OF Record, in these words:—
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“ Proceeding next to the Desai's allowances, the village of Kullum, or (as written in the Sanad) Kullub, is confirmed by Government, as you recommend, and on the same grounds the Palanquin establishment with sepoy's, and peon's allowance to Dawlutrai, from the beginning of the current Mrngsal, but, without arrears for the time the same has been suspended.

“ The article Sootchumra is to be resumed from him and the other Desais, on the like principle, as ordered in respect to Jee Baboo, and the article of Sadur, as applicable to all those Desai offices, is left to you to confirm or revoke according to your sense of its justice and expediency.”

We accordingly find that Dawlutrai, in his subsequent Kabulayat, or acknowledgment, of the 20th March 1809 (e. 44, p. 50), whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (dustoor) and Passaita land, and agrees to treat those allowances as subject to the future orders of Government, ceases to make mention of the Palkhi allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of Broach, which have been produced, in which, at least after April 1809, it is treated as one of the general charges on the revenue.

Dawlatrai died in 1828. He was succeeded in the office of Desai by his son Hukamatrai, who thereupon applied for the Palkhi allowance to the Collector of Broach. It was paid to him by that officer, without any fresh or distinct grant or order of the Government, the payment continuing as before to be entered in the Collectorate accounts as a general or permanent charge on the revenues of the district. This state of things went on without question until the year 1856. In that year, the right of Hukamatrai to this allowance was

first questioned. He was required to explain how he was in receipt of it, and made, on the 28th of December 1856, the statement at p. 31 of the Record. No final order, however, seems to have been passed by Government on this matter until the 28th of November 1861, when, on the report of the Revenue Commissioners, dated the 3rd of October in that year, it was resolved as follows:—"The allowance is clearly a personal allowance, and should, as recommended by Mr. Peile, be transferred to the head of 'Life Pensions.' It should cease on the death of the present incumbent Hukamatrai."

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Hukamatrai died some time in 1863. The payment of the allowance then ceased, and in December 1864 the respondent commenced this suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the respondent had, under the provisions of the Bombay Regulations No. 5 of 1827, Chap. I, Sec. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunnah, can properly be said to be "immoveable property" within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dawlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. The question between the Government and the respondent

1872. is, whether the allowance was enjoyed by hereditary right, or
 THE GOVERN- by virtue of a grant for life, express or implied, to each suc-
 MENT OF cessive taker. So long as Dawlutrai lived, his enjoyment of
 BOMBAY the allowance would be as consistent with the one contention
 v. as with the other.
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A Jahagirdar for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when Hukamatrai began to receive the allowance without a fresh grant, and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of Hukamatrai was then called in question ; and there was the commencement of an investigation of his title which appears to have lasted until the final order of Government in November 1861. There was, on the part of Government, no admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion that the Regulation affords no bar to the trial of the question between the Government of Bombay and the respondent upon its merits.

Again, both the learned Judges of the High Court appear to have acted on a presumption that the title of the respondent to an hereditary grant was founded, not on the documents produced, but on some lost or missing Sanad which contained words of inheritance. In making this presumption, they drew certain inferences against the Government and in favour of the plaintiff from the non-production of the report of the 31st of May 1807. That document is, however, now before their Lordships ; the appeal has been argued as if it were part of the evidence in the cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the plaintiff's title.

The first trace of the allowance in question is to be found in the Perwannah C, annexed to No. 52, Supplementary Record page 49, which, if not a grant, recites a grant by the Nawab Hyder Joolee Khan to Khushalrai Desai, in recompense of his extraordinary services as Desai, fixes the allowance for the sustentation of that dignity at 1,972 Rupees (being 1,200 Rupees for the Palkhi, and 772 Rupees for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th Shaban, in the 9th year of the reign," a date which it would be difficult to fix. But as the grant purports to have been made by the Nawab, and there is no mention of the Gaicowar, it may be presumed that this Perwannah was issued before 1685, when the actual sovereignty over the territories, in which Pergunnah Broach is situated, passed into the hands of the Mah-rattas.

This grant, however, whatever its nature, appears to have been afterwards superseded; for, the earliest Mahratta document produced by the respondent in support of his title (being C. 2, p. 3), and said to bear a date corresponding with 1753-54, is in favour of Bhikaridas, the son of Khushalrai, and imports the grant to him by the Gaicowar of a Palkhi, with an allowance of only 1,100 Rupees for keeping it up. This document seems to have been intended to operate both as a Sanad or grant, and as a Perwannah or order addressed to the officers who were to pay the allowance; for, it is stated that, across the Hindee Perwannah, to the officers, there is written a memorandum in Persian to the effect "a Sanad for a Palkhi in the name of Bhikaridas Desai." Bhikaridas was succeeded by Jamiyatrai. Several Perwannahs issued by the Gaicowar during the life of this Desai are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-63 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, at p. 7, contains proof of an augmentation of the previously existing allowance by the wages of seven sepoy's thereby assigned to him. Jamiyatrai died in 1774-1775, and thereupon the Gaicowar of the day issued

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what is termed a "a consolatory letter," in the shape of a Perwannah, to the revenue officer at Broach, which contained this passage : "Jamiyatrai Desai is dead. Giving consolation to his son, Dawlutrai Desai, in many ways, you are from time to time to get the business and affairs of the Mehal transacted by his hands, as has been done; and you are to pay from time to time his Palkhi and Sebandi allowances as they now exist." The whole of this document, including the expression that "they" (Dawlutrai and his ancestors) "had from ancient times belonged to the Sirkar," implies the existence of at least a customary right of succession to the allowance with the office of Desai from father to son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the sovereign.

This is the latest document issued by the Gaicowar; and indeed the date as given in the Record is later than the taking of the city of Broach by the British. The authority, however, of the Gaicowar may, at that time, have continued to exist in the surrounding district.

The next document is the Perwannah of Scindia issued on the application of Dawlutrai in April 1786. It recites the application of Dawlutrai which appears to have been in the nature of a claim by hereditary right, since it refers to the grant to his grandfather, Bhikaridas, as the foundation of his title, making no mention of any intermediate grant to his father Jamiyatrai. The allowance was then fixed by Scindia at Rs. 1,352, and directed to be continued to Dawlutrai as Desai. And a further direction was given to take a copy of the document and to return the original (called a Sanad) to the Desai for his use. This is the last of the native documents, Dawlutrai being still alive and in the enjoyment of the allowance when the territory of Broach was ceded to the British in 1803.

Reviewing these native documents, their Lordships are unable to find any which import, by express words of inheritance, that the Palkhi privilege with its allowance was to be

enjoyed from generation to generation by the original grantee and his heirs. And it is now clear that the report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a Sanad in those terms may be inferred. Their Lordships are disposed to infer from the terms of Scindia's Perwannah, and the earliest of the Gaicowar's Perwannahs, that there was no Sanad other than those documents importing the grant of the allowance to Bhikaridas, and the confirmation of the allowance to Dawlutraí. On the other hand, the documents do not appear to support the appellant's contention that the allowance was merely personal to each taker, and the subject of a separate grant to each in succession.

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There is no trace of such a grant in favour of Jamiyatrai. When Dawlutraí succeeded to Jamiyatrai, he was treated as succeeding to the allowance by the same title to which he succeeded to the Desaiship; the confirmation of Scindia is founded on an original grant to Bhikaridas; and the whole tenor of the documents is in favour of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of Desai.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808, as amounting to a new and enlarged grant. Nor do they consider that the accounts, or the acts of the Government officers, on the death of Dawlutraí, though they afford evidence that Government up to 1856 considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim of a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was that the Government of that day intended to confirm, and did confirm, the title of Dawlutraí, whatever it might be, without enlargement, but also without diminution. But the inference which their Lordships draw from the report, and the letter of Government thereon, is that the Government of that day was dealing, and

1872. intended to deal, not with the mere rights and allowances of the individual Dawlutrai, but with the emoluments of the hereditary Desaiship held by his family. And it is on the special ground that under the native rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs,

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[APPELLATE CIVIL JURISDICTION.]

June 14.

Civil Petition No. 10 of 1872.

NA'RA'YAN bin SIDOJI*Applicant.*

DA'VUDBHA'I valad FATEBHA'I.....*Opponent.*

Practice—Review of District Judge's judgment after admission of Special Appeal—Cancellation of order admitting Special Appeal—Civil Procedure Code Secs. 376, 378.

After a special appeal had been admitted, the special appellant withdrew it with permission to apply for a review of the Lower Appellate Court's judgment. The District Judge refused to grant a review on the ground that the admission of the special appeal was a bar to his doing so.

The High Court, to remove the difficulty raised by the District Judge, reviewed and cancelled its own order admitting the special appeal and directed that a review (which, it considered, the District Court had now power to grant) should be again applied for.

THIS was a petition for the exercise of the High Court's extraordinary jurisdiction in the matter of an order made by R. H. Pinhey, District Judge of Púna.

The applicant, Náráyan bin Sidoji, preferred a special appeal to the High Court against a decision of the District Court of Púna in Appeal No. 557 of 1866. The appeal was admitted and registered under No. 354 of 1868. On the 15th September 1868, Náráyan applied to, and obtained

leave from, the High Court (Tucker and Gibbs, JJ.) to withdraw the special appeal with permission to apply to the District Judge of Puna for a review of the judgment against which the special appeal had been preferred. Accordingly, an application for review was made by Náráyan, but the District Judge, on the 16th December 1871, rejected it on the grounds contained in the following extract from his judgment:—

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“ Mr. Sakhárám Apáshet Gadkari, Pleader for the opposite party (Dávudbhái), urges that this application cannot be allowed, as a special appeal was admitted by the High Court in this case (Section 376 of the Code of Civil Procedure).

“ The objection appears to me fatal to the present application. A special appeal was admitted in this case. By Section 376 of the Code of Civil Procedure, a review of judgment of a District Court passed in regular appeal is admissible only if no special appeal have been admitted by the High Court. The Pleader of applicant contends that as the High Court permitted the applicant to withdraw from the special appeal, he is in the same position as regards his present application as if he had preferred no special appeal, but this is not the case. The withdrawal of suits is governed by Section 97 of the Code of Civil Procedure, but this section does not treat suits withdrawn as if they had been never instituted. It limits and prescribes the terms under which suits may be withdrawn and the consequences that are to follow withdrawal. I regret this result as far as this application is concerned ; for, it appears from the High Court's judgment that there would have been strong grounds for admitting the application, if it had been legally admissible. But I cannot, of course, transgress the law for the purpose of giving relief to an unfortunate litigant. The hardship to the applicant is, however, to be ascribed really not to any provision of law, but to the carelessness with which his interests were watched, when his case was under trial before the Court of Original Jurisdiction. In my opinion, it is the duty of a District Court to interpret the provisions of Section

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376 of the Code of Civil Procedure with strictness, for the Judges of a District Court are frequently changed, and the advent of a new Judge is liable to be made the occasion for a number of applications for the review of judgments passed by his predecessors * * * Considering, however, that no review is admissible under Section 376 of the Code of Civil Procedure of the decree of the District Court in this case, I reject this application."

The petition was argued before Sargent, C. J., and Melvill, J., on the 14th June 1872.

Dhirajlal Mathuradas for the applicant :—The District Judge has misconstrued Sec. 376 of the Civil Procedure Code in holding that no review of judgment passed in regular appeal is admissible after a special appeal has been admitted in the High Court, especially when the High Court itself directed that a review of the judgment should be granted in the interest of justice.

Nagginadas Tulsidás, contra.

Per Curiam :—This is an application to obtain (in the exercise of our Extraordinary Jurisdiction) a review of an order passed by the District Judge of Puna on the 16th December 1871.

The applicant was appellant in Special Appeal No. 354 of 1868, and, on the 15th September 1868, was permitted by this court to withdraw his appeal, with a view to apply for a review of judgment in the appellate court. His application for a review has now been refused by the District Judge on the ground that the law does not allow a review of a judgment against which a special appeal has been admitted.

This question was incidentally considered in the recent judgment of a Full Bench of this Court in *Nánabhái Vallabhulās v. Náthabhái Haribhái*, (a) in which it was held that the discovery of fresh evidence is no ground for a review of a judgment passed in special appeal. The learned Judges pointed out that when fresh evidence is discovered during the pendency of the special appeal, the practice of

(a) Supráp. 89.

this Court has supplied a remedy by permitting the special appellant to withdraw his appeal, with a view of presenting an application for review in the Court below. And then, having regard to the difficulty which has been raised by the District Judge in the present case, viz., that a special appeal has not the less been "admitted," because it is subsequently withdrawn, the learned Judges say: "On granting the permission to withdraw the special appeal, the Court might direct that the order, by which the special appeal has been admitted, should be cancelled."

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It appears to us that the proper course is that indicated in the words above quoted. An order admitting a special appeal is open to review like any other order and may be cancelled, if such cancellation be "requisite for the ends of justice" (Section 378, Act VIII. of 1859). If the order for admission be annulled, it is as if the order had never been made.

The applicant has now applied in due form for a review of the order admitting his special appeal, and the Court has granted the review and annulled the order.

The applicant can again apply to the District Judge for a review of judgment, which will doubtless be granted, now that the difficulty raised by the District Judge in his order of the 16th December 1871 has been removed.

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June 19.

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 28 of 1870.*THE GOVERNMENT OF BOMBAY *Appellant.*RANMALSINGJI AMARSINGJI *Respondent.**Jurisdiction—Consent—Land situated beyond British Territories.*

The Raja of Dangadra—an independent Chief—sued the Government of Bombay for a village which he described in the plaint as situated in the Raja's own territory. The District Judge of Ahmedabad rejected the suit for want of jurisdiction, as the village in dispute was beyond the British territories. On appeal, the High Court remanded the case for retrial on the merits on the agreement by the plaintiff that he would so amend the plaint as to bring the suit within the jurisdiction of the Ahmedabad District Court. The plaint was accordingly amended, and the District Court decided the case on the merits in favour of the plaintiff. The High Court, however, finding that the amendment did not alter the original statement in the plaint regarding the situation of the village, and finding that the plaintiff's evidence and arguments were directed solely to prove that the village was not in British but foreign territory, annulled the decree, although both the parties expressed their willingness that the appeal should be decided on the merits, the court acting on the rule of law that no consent of parties can give to the court a jurisdiction which it does not possess over the subject matter of the suit.

THIS was a Regular Appeal from the decision of C. B. Izon, Acting District Judge of Ahmedabad, in Original Suit No. 1 of 1866.

Ranmalsingji, the Rajah of Dangadra, brought this suit against the Government of Bombay to establish his proprietary title to the village of Sultanpur which he described in the plaint as situated in his own territory. He alleged that in consequence of a quarrel arising between himself (Ranmalsingji) and the Chief of Bajana, the Bombay Government interfered between them, and in 1862 took possession of the village in dispute, referring the plaintiff to a civil suit to prove his title thereto. On the 27th October 1866, the suit was rejected by the District Judge of Ahmedabad on the ground that that court had no jurisdiction to try the claim. The Judge observed :—

“ This is a plaint in which the Rajah of Dangadra wishes to recover from Government the village of Sultanpur and

three years' mesne profits. He says that as there was a quarrel between him and the Chief of Bajana about this land, Government interfered. This is clearly not a civil but a political matter. Government annexes a village, and a Chief comes to my court and claims it as part of his dominions, over which he is sovereign. No civil court can try such a case. It makes no difference whether the land claimed be one village or a large kingdom, the same principle rules in both cases. Section 1 of Act VIII. of 1859 gives civil courts cognizance in cases of a civil nature, but no law allows me to decide such a case as this, nor can any Government give a court power which is not according to law. Therefore, even were the document purporting to be a copy of a resolution of Government (but not certified) proved to be so, it could give me no power save what I already have. Suppose, I was to try this suit and decide for the plaintiff; in carrying out the decree of my court, I should have to order land to be given up, which by the decree would be decided to be beyond my jurisdiction, in the dominions of a foreign Chief. No court can do so. The plaintiff, if he wishes to get the village, must proceed by appeal to the Supreme Government or the Secretary of State for India or Parliament. He cannot bring matters of annexation before any civil court with a view to having his land restored to him."

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On appeal, the High Court remanded the case for trial on the merits, the plaintiff's Vakil, with the consent of the Government Pleader, having agreed to amend the plaint in such a manner as to show that the suit was within the jurisdiction of the District Court of Ahmedabad. On remand, the District Judge, on the plaint being amended by the plaintiff, framed the issue: "can plaintiff establish his right to the village either by original title or by a prescriptive title, acquired by long possession?," and disposed of the case on the merits, holding the plaintiff's claim proved (4th February 1870). The Judge remarked:—

"The village is one isolated from the Veramgaum Taluká, and it cannot be shown that Government occupied it or

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derived revenue from it. It adjoins the villages of Dangadra. The Chief of Dangadra had received some rent for grass from it; it had been granted in former times as a portion for maintenance to a daughter of the Chief who married the Mussulman Nawab of Radhanpur, and at a later period in the dispute between Dangadra and Bajana, it is incidentally referred to as belonging to Dangadra and this long before the present dispute, and when it is not to be supposed that there was any intention to make evidence to be, perhaps, afterwards used against Government. The plaintiff and his ancestors were, as I believe, for nearly a century, at least, always in possession of the village.

"I find that the plaintiff has proved a prescriptive title to the village of Sultanpur and the lands thereof.

"I accordingly declare his proprietary right to the same, and direct that the defendant do deliver up possession of them to the plaintiff."

Against this decree, the Government of Bombay appealed to the High Court on the 6th June 1870. The appeal was argued before Sargent, Acting C.J., and Melvill, J., on the 19th June 1872.

Latham, Acting Legal Remembrancer, and *Dhirajlál Mathuradas* (Government Pleader) for the Appellant.

Shántarám Náráyan for the respondent.

Cur. adv. vult.

SARGENT, C.J. :—We are reluctantly constrained to come to the conclusion that the District Court of Ahmedabad had no jurisdiction to try this suit; such was in the first instance the conclusion of the District Judge; and though his decree was reversed and the case remanded by the High Court, it is clear that the ground of that reversal was not that this court dissented from the view taken by the District Judge as to the law bearing on the question, but that the plaintiff entered into an undertaking so to amend his plaint as to bring the subject of his claim within the jurisdiction of the Civil Court. The judgment of this

Court was as follows :—" As the plaintiff, through his pleader Mr. Nánábhái Haridás, states that his present claim is only to be declared the proprietor of the village of Sultanpur, situate in the Pergunah of Veramgaum in the British district of Ahmedabad, and as Mr. Dhirajlál, on behalf of the Government of Bombay, admits that the said village is located within the territorial jurisdiction of the District Court at Ahmedabad and signifies the assent of Government to the remand of the suit for disposal by the District Court of Ahmedabad on the merits, the court reverses the decree of the District Judge of Ahmedabad, dated the 27th October 1866, and inasmuch as the reference of a suit to the Assistant Judge of the value of Rs. 29,400 was illegal, the court further annuls the previous orders made by the District and Assistant Judges in the course of the suit, and directs that the plaint be returned to the plaintiff to be amended in the manner which has been agreed upon, and that upon its being so amended, the said plaint be registered in the court of the District Judge of Ahmedabad and be disposed of by the District Judge on the merits."

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From this it is evident that the plaintiff, through his pleader, agreed to admit that the village in dispute was not situated beyond British territory, but in the Purgana of Veramgaum in the British district of Ahmedabad, and consequently within the jurisdiction of the District Court of Ahmedabad, and he further undertook to amend his plaint accordingly. The amendment, which he has actually made, is as follows :—

"Owing to my plaint containing the words, ' the village of Sultanpur,' a village of my ' Táluká,' the Judge thought that my object was to have the Civil Court make a declaration of my right to rule (or govern) in the said village, and thereupon recorded a finding that the Civil Court had no jurisdiction in such political matters. I, therefore, in that behalf make an amendment here, and state, for clearness's sake, that I have no desire at all in this matter to have any determination of political matters. The claim is simply for having a declaration of my proprietorship."

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The plaint, as thus amended, contains no admission that the village in dispute is in British territory. The original statement in the plaint, that the village is in the plaintiff's territory remains unaltered, and the evidence offered by the plaintiff and the arguments founded upon it, has been directed solely to the establishment of the allegation that the village is not in British but in foreign territory. Under these circumstances, the case comes before us in precisely the same state as when it was last before the court ; and although both parties are willing that we should decide the case on the merits, no consent of parties can give to the court a jurisdiction which it does not possess over the subject matter of the suit ; and we have, therefore, no choice but to annul the decree of the court below, as having been made without jurisdiction.

Under all the circumstances of the case, we order that the parties bear their own costs.

Decree reversed without costs.

[APPELLATE CIVIL JURISDICTION.]

June 26.

Special Appeal No. 39 of 1872.

JA'DAV RUGHNA'TH *Appellant.*
RA'LJI HIMMAT *Respondent.*

*Registration—Act XVI. of 1864, Sections 13 and 14,—Act X. of 1862—
General exemptions—Surrender by a tenant to his landlord.*

A document, which is substantially a surrender by a tenant of his interest in land to his landlord, and, as such, is exempted from stamp duty by Act X. of 1862 under the general exemption clause, does not require registration under Act XVI. of 1864, Sections 13 and 14.

THIS was a special appeal from the decision of W. H. Newnham, Acting District Judge of Súrat, in Appeal Suit No. 191 of 1870, confirming the decree of C. Edalji, Subordinate Judge of Wagra.

Jáдав Rughnáth brought this suit against Ráiji Himmat, to establish his right to sell certain land and a *gabhán*

(building site) as the property of his judgment debtor, Bái Lakhmi. Jádav had previously attached the said property in execution of a decree obtained by him against the said Lakhmi. The attachment, however, was raised on the application of the defendant, Ráiji, under Sec. 246 of the Civil Procedure Code. In the documentary evidence filed by Jádav in the suit, was a writing, dated Samvat 1921 (1st August 1865). This document was passed by Ráiji and his brother Tulsi to Bái Lakhmi as her tenants. It purported to relinquish all rights to a house, a *gabhán*, and some trees which formed part of certain land which Ráiji and his brother had held as Lakhmi's tenants. The value of the property was not stated in the document.

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The defendant, among other things, pleaded the Statute of Limitation, and stated that he had been in possession of the property in his own right for more than 12 years.

The Subordinate Judge threw out the claim as barred by limitation (23rd August 1870), holding the document of Samvat 1921 inadmissible in evidence, as it was not registered, registration being necessary under Act XVI. of 1864. In Appeal, Jádav, among other objections, took exception to the Subordinate Judge's improper rejection of the document of Samvat 1921. The District Judge, however, confirmed the Lower Court's decree (13th December 1871), and gave the following reasons for not admitting the above document in evidence :—

“ The document of Samvat 1921 is passed by Ráiji and Tulsi to Lakhmi, and purports to relinquish all rights to a house, *gabhán*, land and trees belonging to certain land which they had held as tenants of hers, and was rejected because not registered, under Section 13 of Act XVI. of 1864, which was then in force. It is not disputed that the value of the property is above Rs. 100, but it is contended that the document creates no new right, and, therefore, does not fall under the section. It, however, clearly ‘ purports to extinguish a right or title in immoveable property ;’ and the Lower Court was right in rejecting it being unregistered.”

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Against this decree, Jádav preferred a Special Appeal to the High Court on the 6th January 1872, and in the memorandum of appeal took the following grounds of objection on the point of registration:—(1) The Lower Court was wrong in holding that the document of Samvat 1921 required registration, without ascertaining whether the lease, which the said document purported to surrender, was one that required registration under Act XVI. of 1864. (2) The Lower Court held that the said document extinguished an interest in land of the value of more than 100 Rs., whereas, the said document requiring no stamp under Act X. of 1862, the interest relinquished by it was of no value, under Act XVI. of 1864.

The appeal was argued before Sargent, C.J., and Kembball, J., on the 26th June 1872.

Chunilál Mániklál for the special appellant:—Where the value of immoveable property is not stated in a document as in the case of the document of Samvat 1921, the question whether such document requires registration or not is determined by considering whether or not such document is subject to the payment of stamp duty. If it is exempted from stamp duty, as the document in question is, under the general exemption clause in Act X. of 1862, Schedule A, being a surrender or renunciation of land, its registration is not necessary. No external evidence should be taken to ascertain the value of immoveable property, where the writing itself does not state such value. He cited *Ishan Chunder v. Sooja Bebee* (a); *Rohinee Debia v. Shib Chunder* (b), and referred to Sections 13 and 14 of Act XVI. of 1864.

Dhirajlál Mathurádás contra; the document in question is not a surrender or renunciation by a ryot or other actual cultivator of the land, within the meaning of the general exemption clause at the end of Schedule A of the Stamp Act of 1862. That exemption does not apply to the surrender of a lease of property of the description mentioned in the document of Samvat 1921; it applies only to the renunciation of land by cultivators as distinguished from a house and a building site.

(a) 15 Calc. W. Rep. Civ. R. 331.

(b) *Ibid* 558.

PER CURIAM :—The Court considers that the Acting Judge was wrong in refusing to admit the document dated Samvat 1921 in evidence. It is substantially a surrender by a tenant of his interest to his landlord and as such being exempted from stamp duty by Act X. of 1862, it does not require registration, regard being had to Sections 13 and 14 of Act XVI. of 1864.

The decree must be, therefore, reversed and the case remanded for the Judge to take into consideration the document in question, and to pass a new decree. Costs to abide the result.

Decree reversed and case remanded.

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[APPELLATE CIVIL JURISDICTION.]

Civil Petition.

July 2.

MAHA'DAJI GOVINDPetitioner.

SONU bin DAVLATA'Respondent.

Extraordinary Jurisdiction of High Court—Power of Superintendence—Reg. II. of 1827 Sec. V., Cl. 2—Stat. 24 & 25 Vict. Ch. 104, Sec. 15—Mámlatdár's Court—Act (Bombay) V. of 1864.

Distinction between the High Court's Extraordinary Jurisdiction under Cl. 2 of Sec. 5 of Reg. II. of 1827, and its general power of superintendence, under Section 15 of Stat. 24 and 25 Vict. Cap. 104, pointed out, and the occasion for the exercise of the former stated.

The Mámlatdárs' Courts, constituted under Bombay Act V. of 1864, are Subordinate Civil Courts within the meaning of Cl. 2, Sec. 5, Reg. II. of 1827. The High Court has, therefore, power, in the exercise of its Extraordinary Jurisdiction, to set aside an order made by a Mámlatdár under Bombay Act V. of 1864.

THIS was a petition to the High Court for the exercise of its Extraordinary Jurisdiction under Regulation II. of 1827, Sec. 5, Clause 2, praying for the reversal of an order made by the Mámlatdár of Suvarnadurg in the Ratnágiri District under Bombay Act V. of 1864. The order was passed by the Mámlatdár in a summary suit brought by Sonu against Mahádáji Govind for restoration of possession of

1872. certain immoveable property. Sonu's plaint was presented on the 21st December 1869 and the Mámlatdár's order was made on the 16th May 1870, directing possession of the disputed property to be restored to Sonu.

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The petition was first heard *ex parte* by Gibbs and Kemball, J.J., on the 10th November 1870 when the Mámlatdár's decree was annulled. A *rule nisi* for a review was granted on the 29th September 1871, and the same having been subsequently made absolute, the petition was restored to the file and argued before Sargent, Acting C.J., and Melvill, J., on the 2nd July 1872.

Vishvanáth N. Mandlik for the petitioner :—The Mámlatdár's decree was made without jurisdiction. The alleged dispossession, as would appear from his decision, took place in February 1869, and the suit was not filed till the 21st December 1869, which was more than six months from the time of the dispossession.

Shántarám Náráyan in support of the Mámlatdár's decree :—The power vested in the Sudder Dewanee Adawlut by Cl. 2, Sec. 5 of Reg. II. of 1827, was to be exercised only in the case of courts which that Regulation constituted and not in the case of courts constituted by any other law. The Mámlatdárs' Courts, therefore, are not Subordinate Civil Courts within the meaning of that Regulation.

SARGENT, C.J., :—This is an application for the exercise of the Court's Extraordinary Jurisdiction with a view to set aside an order made by a Mámlatdár under Bombay Act V. of 1864.

What is called the Extraordinary Jurisdiction of this Court (as distinguished from its general power of superintendence vested in it by Section 15 of Stat. 24 and 25 Vict., Cap. 104) is derived from Clause 2, Section 5, Regulation II. of 1827, which is as follows :—

“ It shall also be competent to the said Court (the Sudder Dewanee Adawlut) to call for the proceedings of any Subordinate Civil Court and to issue such orders thereon as the case may require.”

This power, which has been transferred to the High Court by Section 9 of the above statute, enables this Court to pass any order it may see fit in regard to the proceedings of any Civil Court subordinate to it. The words of the law impose no limit on the exercise of the power ; but the Court has, in its discretion, consistently refused to exercise its Extraordinary Jurisdiction except in cases which disclose some grave and patent error, not otherwise to be remedied. The questions which we have to consider are, (1) whether the Mámlatdár's Court is a Subordinate Civil Court, and if so, (2) whether the present application discloses a fit case for the exercise of our Extraordinary Jurisdiction.

As to the subordination of the Mámlatdárs' Courts to the High Court, there can, we think, be no question. Though Bombay Act V. of 1864 confers upon the Mámlatdárs' Courts a new jurisdiction, it expressly declares the Courts to be the same Courts which are referred to in Regulation VI. of 1830, which Regulation provided that an appeal should lie from the decisions of those Courts to the Collector or Sub-Collector, and from that officer to the Sudder Dewanee Adawlut. Thus the Mámlatdárs' Courts were distinctly subordinated to the Sudder Dewanee Adawlut, and any powers which the Sudder Dewanee Adawlut had, by virtue of such subordination, have been transferred to the High Court. If the Mámlatdárs' Courts were subordinate to the Sudder Dewanee Adawlut, under Regulation VI. of 1830, they are subordinate to the High Court now. The circumstance that Regulation VI. of 1830 has been repealed by Bombay Act II. of 1866, and that Bombay Act V. of 1864 makes no provision for appeals from the Mámlatdárs' Courts, does not affect the question. The High Court cannot be deprived of any power vested in it by its Charter over Subordinate Courts by any Act of the Bombay Legislature ; nor, it may be added, is there any reason to suppose that there was an intention to deprive it of such power.

The whole question then resolves itself into this. Are the Mámlatdárs' Courts, " Civil Courts " within the meaning of Clause 2, Section 5, Regulation II. of 1827 ? It has been

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argued before us that the sole object of that clause was to give to the Sudder Dewanee Adawlut a control over the Courts which were constituted by that Regulation. But we see no reason to think that such was the intention. On the contrary, it seems unreasonable to suppose that there could have been an intention to give to the highest court of appeal a general power of interference, in regard to a particular class of suits, and to exclude that power in regard to another class of suits of a similar character and of at least equal importance. For a reference to Chapter VIII. of Regulation XVII. of 1827 (which Regulation was passed simultaneously with Regulation II. of 1827) shows that the class of cases assigned to what were ordinarily called the Revenue Courts, included all claims for the possession of lands and other questions of a civil nature involving the most important interests of the community.

It would be difficult to believe, and certainly should not be assumed without strong evidence, that the Legislature, while constructing the same machinery of appeal from the Revenue, as from the ordinary Civil Courts, thought it desirable to give to the highest court of appeal an additional power of interference with regard to the proceedings of the ordinary Civil Courts, but refused to give it the same power to remedy similar failures of justice in the Revenue Courts. So far from there being any strong evidence of such intention we think that the words of Clause 4, Section 21, Regulation II. of 1827, which speak of the suits "which come under the civil cognizance of the Collector in pursuance of Chapter VIII. Regulation XVII. A.D. 1827," and the provisions of the last-mentioned Chapter (and particularly Section 32), declaring that in their proceedings generally the Revenue Courts should be held to be Courts of Civil Jurisdiction, sufficiently indicate that the power of the Sudder Dewanee Adawlut to call for the proceedings of the Subordinate Civil Courts under Clause 2, Section 5, Regulation II. of 1827 was intended to apply to the Revenue Courts created by Regulation XVII. as well as to the ordinary Civil Courts constituted by Regulation II. of 1827.

It is scarcely necessary to add that the power thus given, to call for the proceedings of the Collector's Court, as being a Subordinate Civil Court, necessarily involved, upon the passing of Regulation VI. of 1830, the power to call for the proceedings of the Mámlatdár's Court, which was subordinate to that of the Collector.

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Having thus arrived at the conclusion that we have the power, in the exercise of our Extraordinary Jurisdiction, to set aside an order made by a Mámlatdár under Bombay Act V. of 1864, we have next to decide whether sufficient grounds have been shown in the present instance.

After a careful consideration of the proceedings, we are of opinion that sufficient grounds have not been shown. It is not clear on the face of the Mámlatdár's proceedings that he was in error in holding, as he certainly did hold, that a dispossession had taken place within 6 months. The process of reasoning by which he arrived at this conclusion may be somewhat confused and not, in every particular, satisfactory. But we think that we should not interfere, unless it be quite clear that the Mámlatdár's order has been made without jurisdiction, and this certainly is not clear in the present instance.

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July 9.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 9 of 1872.

DA'MODHAR LAKHMIDA'S.....*Appellant.*

GULABDA'S LA'LBHA'I*Respondent.*

Limitation—Act XIV. of 1859, Sec. 20—Execution of decree—Warrant.

On the 26th June 1867, a decree-holder applied for execution of his decree. A notice was thereupon issued to the judgment debtor to show cause on the 13th July 1867 why the decree should not be executed against him. The judgment debtor not appearing to show cause on the 13th July 1867, the Subordinate Judge of Surat ordered a warrant to be issued. Subsequently on the same day (13th July 1867), the decree-holder applied to the Court to stop all further proceedings in the case, on the ground that the judgment debtor had promised to satisfy the decree. The decree, however, remaining unsatisfied, the judgment creditor, on the 12th July 1870, presented a second application for execution. The Subordinate Judge rejected it as barred under Sec. 20 of Act XIV. of 1859, as it was beyond three years from the 26th June 1867, the date of the previous application. In Appeal, the District Judge confirmed the order.

On special appeal, the High Court reversed the orders of both the lower courts and held the proceedings to have commenced on the 26th June 1867 and continued till the 13th July 1867 on which day the judgment debtor was to show cause, and up to which day, therefore, the judgment creditor must be considered as going on with one and the same proceeding, as the first court actually made an order for a warrant to issue on that day.

THIS was a Miscellaneous Special Appeal from the order of W. H. Newnham, Acting District Judge of Súrat, in Miscellaneous Appeal No. 285 of 1871, confirming the order of the Subordinate Judge of Súrat.

Dámodhar obtained a decree against Gulabdas, in the Court of the Principal Sudr Amin of Súrat, on the 25th September 1861. After several ineffectual attempts at execution, he made an application to execute his decree on the 26th June 1867. A notice was issued on the same day, calling upon the judgment debtor to appear on the 13th July 1867 to show cause why the decree should not be executed against him. The notice was duly served on Gulabdas. The Court took up the case on the 13th July 1867. The name of

Gulabdás was called out, but as he did not appear to show cause, the Court passed an order for the issue of a warrant. During the course of the day, however, the decree-holder represented to the Court that as the judgment debtor promised to satisfy the decree in a short time, no further proceedings might be taken in the matter for the present. The execution case, accordingly, was struck off the file on the 13th July 1867. On the 12th July 1870, another application for execution was made by the decree-holder. Gulabdás contended that it was barred by limitation. The First Class Subordinate Judge of Súrat considered the previous proceedings in execution pending only till the 26th June 1867, the day on which the former application was presented, and held the application of the 12th July 1870 barred by Section 20, Act XIV. of 1859, as it was beyond three years from the date of the previous application. In appeal, the District Judge of Súrat confirmed the order of the first Court.

The appeal was argued before Sargent, Acting C.J., and Melvill, J., on the 9th July 1872.

Nagindás Tulsidás for the appellant :—As the case was called on for hearing on the 13th July 1867 and an order for the issue of a warrant was made on that day, the proceedings must be regarded as pending up to that date. Any act *bonâ fide* performed by the execution creditor or by the Court or its officer for the furtherance of the execution of the decree is a proceeding within the meaning of Sec. 20 of Act XIV. of 1859. In the present case, a warrant for execution was actually ordered to be issued. It could not be maintained that that order was not for the furtherance of the execution of the decree. The mere fact of the case being subsequently struck off the file, does not show any want of *bonâ fides*, on the part of the decree-holder. He cited *Ram Sahaye Singh v. Degun Singh* (a).

Dhirajlál Mathurádás contra. :—On the 13th July 1867, the judgment debtor was not present in Court. The decree-holder, of his own accord, asked the Court on that day to

(a) 6 Calc. W. Rep. Mis. R. 98.

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1872. drop all proceedings. It could not, therefore, be maintained
 DA'MODHAR that he was acting *bond fide* to have his decree satisfied.
 LAKHMIDA'S Hence, according to the several rulings of this Court and of
 v. the Calcutta High Court, the application of the 12th July
 GULABDA'S 1870 must not be considered as made in time. [Melvill, J.,
 LA'LBHA'L. referred to the ruling of the Privy Council in *Roy Dhunput Singh v. Madhomotee Debia (b).*]

PER CURIAM :—The Acting Judge was wrong in holding that the last proceeding in execution was on the 26th June 1867. That was the date of the commencement of the proceedings which continued up to the 13th July 1867, the day on which the defendant was to show cause, and the plaintiff must be considered as going on with one and the same proceeding up to that day. Moreover, it appears from the record of proceedings in execution that the Court actually made an order for a warrant to issue on that day, although it was subsequently vacated by the desire of the plaintiff. The order, therefore, must be reversed with costs on special respondent throughout.

Order reversed with costs.

(b) 8 Madras Jurist, 308.

[APPELLATE CIVIL JURISDICTION.]

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July 9.*Special Appeal No. 126 of 1872.*PRA'GJI RUDARJI.....*Appellant.*ENDARJI BHIMBHA'I*Respondent.**Civ. Proc. Code, Sec. 7—Joinder of different causes of action.*

In 1869, P. brought a ~~suit~~ against his grandmother K. and another person, for possession of a piece of land which P. alleged had descended to him from his grandfather. In 1870, P. sued the said K. and one E. for some trees which he also claimed by right of inheritance from his grandfather.

Held that the causes of action in the two suits by P. were different, viz., unlawful alienations by K. of the respective properties, the subject matter of the different suits.

Sec. 7, Civ. Proc. Code requires that every suit should include the whole of the claim, arising from the same cause of action, but although the Civil Procedure allows of claims arising from different causes of action being included in the same plaint, there is no provision of law which makes it obligatory on the plaintiff to do so.

THIS was a special appeal from the decision of W. H. Newnham, Acting District Judge of Súrat, in Appeal No. 177 of 1871, reversing the decree of the Subordinate Judge of Bulsar.

Prágji brought this suit against Endarji and Kási, Prágji's grandmother, to recover possession of 40 trees. Prágji claimed the trees as having been inherited by him from his grandfather. Prágji alleged that the trees were in the possession of Kási.

Endarji stated that he purchased the trees from Kási and contended that the claim was barred by the law of limitation and by Section 7 of the Civil Procedure Code.

Kási admitted the sale alleged by Prágji.

The Subordinate Judge awarded the plaintiff's claim, holding that neither the law of limitation nor Section 7 of the Civil Procedure Code barred the suit.

On appeal, the District Judge held that the claim was barred by Section 7 of Act VIII. of 1859, and reversed the

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decree of the Court of first instance. The District Judge gave the following reasons for coming to this conclusion :—

“ Secondly, it is barred by Section 7. I find that in 1869 the plaintiff sued Kási and the heir of one Bhulá for a part of the land that descended from his grandfather, and the contention is that he should have sued for the whole of such property then, and cannot now sue for another portion. The Subordinate Judge has, however, held the claim not barred on the ground that the parties were not identical in the two suits. In *Vithu et al v. N. Dábhulkar (a)* the plaintiff brought separate suits against alienees of joint property including the co-parcener in each. The Court held that as he had one cause of action against the co-parcener, he was wrong in splitting up that claim, but declined to interfere with the decrees of the Lower Courts, because these suits were brought simultaneously. In the present instance, they are successive; and the reason of the present defendants not having been both parties in the former suit is that the plaintiff did not, as he should have done, include Endarji in the former suit, and claim this portion of the family property from him as both co-parcener and alienee. The sale to him by Kási had taken place in 1866 before the former suit, and this claim should have been made in the former suit: *Abhiram Das v. Sriram Das (b)*.

“ In the present case Kási occupies the position of Pándurang in Vithu's case above quoted. I find that under that ruling the plaintiff should have either sued to establish his right to the *whole* property descended from his grandfather either against Kási or Kási and Endarji as a co-parcener and subsequently sued the alienees, or should have brought a general action against the co-parceners and alienees. Not having done so, he has split the cause of action, and as the suits were not simultaneous, the reason for affirming the decree does not exist. I consider, therefore, that the claim must be rejected as barred by Section 7.”

(a) 5 Bom. H. C. Rep. A. C. J. 30. (b) 3 Beng. Law. Rep. A. C. 421.

The appeal was argued before Sargent, Acting C.J., and Melvill, J., on the 9th July 1872.

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Shirshankar Govindram for the appellant :—The Judge was wrong in holding that the claim was barred by Section 7 of Act VIII. of 1859. As the former and present suits were brought on two distinct causes of action, the provisions of that section do not apply to the present suit. He cited *Kákáji Ránoji v. Bápuji Madhavráu (c)*, *Mothoor Mohun Mundul and others v. Khemunkuree Dossee and others (d)*.

Nánábhái Haridás for the respondent.

PER CURIAM :—The causes of action were different in this and the preceding suits by the plaintiff, namely, the unlawful alienations by Káshi of the different properties, the subject matter of the different suits.

Section 7 requires that every suit should include the whole of the claim arising out of the same cause of action, but although the Civil Procedure allows of claims arising out of different causes of action being included in the same plaint, there is no section which makes it obligatory on the plaintiff to do so.

Decree reversed and claim allowed with costs on respondent throughout.

Decree reversed with costs.

(c) 8 Bom. H. C. Rep. A. C. J. 205. (d) 5 Cal. W. Rep. Civ. R. 182

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 79 of 1872.

MADVALA' bin GINA'PA' *Appellant.*

BHAGVANTA' bin DEVJI *Respondent.*

Limitation—Payment—Arrears—Cause of Action.

Where there has been no recognition of title nor any payment of dues within the period of limitation prescribed by law, there is a sufficient bar to the claimant's right to recover, if he ever had any.

The cause of action to establish title and the cause of action to recover arrears which rest on such title are not distinct and independent of each other; so that if the former be barred, even those arrears, which may be within the law of limitations, cannot be recovered.

THIS was a special appeal from the decision of A. Lyon, Acting Assistant Judge Full Power at Solápur, reversing the decree of the Subordinate Judge.

The plaintiff alleged that he was a hereditary holder of the office of Máhár of the village of Varvad in the Collectorate of Solápur and entitled as such to receive from the inhabitants certain dues for services which he was liable to perform at their bidding; and prayed for a decree against the defendant who refused to pay his dues.

The defendant, in his written statement, answered that it was not the plaintiff who was the hereditary holder of the office of Máhár of his village but another person; that he had not taken any service from the plaintiff within twelve years of the filing of his suit and had made him no payment; that without the performance of some service the plaintiff could make no demand; and lastly the demand made was excessive.

The court of first instance raised the following issues:—

1. Is the plaintiff the hereditary holder of the Máhár's office at Varvad?
2. If so, is he entitled to the dues claimed without performing service?
3. Is the claim barred?

I.L.R. 5
Bom 68

but see
the P.C.
in 10 Bom 291

2 Mos. I.A.
23

4. Is the sum asked for correctly estimated?

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The Court on the first issue found for the plaintiff; but against him on the others and therefore rejected his claim.

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The Appellate Court did not consider the first issue, as it was of opinion that the parties had not questioned the finding of the Court of first instance as to the plaintiff being the hereditary holder of the office. On the second issue, it found on the authority of *Beema Shunker et al v. Jamasjee et al* (a) that it was not necessary that the plaintiff should have actually performed any service. On the third issue as to limitation, the Court found on the evidence that the plaintiff had failed to prove any receipt from the defendant within 12 years and that on the other hand the defendant had succeeded in showing that he had ceased to make any payment to the plaintiff for more than 12 years. But the Court was further of opinion that "as there can be no doubt of the plaintiff's ownership," so much of the arrears as were not barred ought to be awarded and passed a decree accordingly.

The defendant made a special appeal to the High Court. It was heard by LLOYD and KEMBALL, JJ.

Bahiravnáth Mangesh for the special appellant :—The Appellate Court has distinctly found that the plaintiff has failed to prove that he has received any payment within 12 years. The original court had gone further and held that he had not at any time received anything from the defendant in respect of the Máhár's office. Upon these findings the claim is completely barred. It comes within the principle laid down in *Máharáná Fatesangji v. Desái Kalliánrái* (b) and *Ráiji Manor v. Desái Kalliánrái* (c), the plaintiff having lost his remedy lost his right also. The Privy Council decision in *Beema Shunker v. Jamasjee* does not apply, as the point in dispute here did not and could not arise in that case. The suit there was brought by the hereditary holders of the offices of Mujmoodar, Parekh, and Mehta for 24 years' arrears of dues against the Inámdár

(a) 2 Moo. Ind. Ap. 23.

(b) 4 Bom. H. C. Rep. A. C. J. 189.

(c) 6 Bom. H. C. Rep. A. C. J. 56.

1872. of Dindolee, when Regulation V. of 1827 was in force. The
 MADVA'LA' first section thereof provided that possession of immoveable
 bin
 GINA'PA' property for thirty years showed good title. The plain-
 v.
 BHAGVANTA tiffs having brought their suit within thirty years the
 bin
 DEVJI. question of extinction of title could not arise. The demand
 of their arrears was held to be limited to twelve years. While the present suit is brought under Act XIV. of 1859 which not only bars the plaintiff's remedy, but if he takes no steps to keep his right to immoveable property alive within twelve years, reduces his right to nothing. If it be held that the cause of action to establish a title and the cause of action to recover arrears were different, there would be no limitation to suits. A hereditary officer might bring his action to recover arrears allowed by the law of limitation for the time being after any number of years even though he have received nothing whatever during all that time.

Janārdan Sakhārām Gādgil for the special respondent :—
 The present case is distinguishable from the Bombay cases cited by the appellant. In both of them, the demand was for fixed yearly allowances. In the present case, the amount due depended upon the produce of each year. If the defendant in any particular year got no produce, the plaintiff could claim no due. It is besides questionable whether the Court's ruling in these cases is correct. It is opposed to the principle recognized in a series of well-known decisions in the matter of instalments. (1) If a debt be payable by twenty yearly instalments and nothing has been paid for fifteen years, this does not extinguish the creditor's right to sue in the sixteenth year, though he will only be entitled to recover those instalments which are not time-barred. The principle enunciated is that a new cause of action arises when each instalment falls due. In the present case, the nature of the right is the same, but the amount varies yearly, and it is, therefore, exactly similar to the above cases and is also similar to the case of *Beema Shunker v. Jamasjee*. The latter case shows that the general right does not be-

(d) *Rāmkrishna v. Bayāji* 5 Bom. H. C. Rep. A. C. J. 35 and *Utanrām v. Girdharlat* 6 Ibid 45.

come extinguished without thirty years' adverse possession under Regulation V. of 1827 Sec. 1 which is still extant and contains the law of prescription for the Bombay Presidency. That this view is correct appears from the observations of Scotland, C.J., in *Doed. Kullamal v. Kuppu Pillai* (e). His Lordship expressly said that the Indian law of limitation barred the remedy only but did not extinguish the right. The Honourable Mr. Stephen supports the same view. In his speech at the second reading of the new Limitation Bill (now Act IX. of 1871) he says "Part IV. is entirely new and comprises a part of the law of British India which is at present in a most vague and unsatisfactory state. I refer to the law of prescription * * *. In the Bombay Presidency there is a Regulation (V. of 1827) which gives in certain instances, a thirty years' prescription; but in Bengal and Madras there is no law at all upon the subject, though there are several vague and inconsistent definitions of the Courts." The new law of prescription which supersedes the law of 1827, is contained in Sec. 27—29 of Act IX. of 1871 and item 131 of Schedule II. shows the point of time from which the limitation in case of hereditary offices is to be counted, viz. "when the plaintiff is first refused the enjoyment of the right." Such a refusal twelve years before the suit has not been shown in this case. As Part IV. of the Act of 1871 is professedly passed to clear up the doubtful part of the Act of 1859, the two may be read together. It is an established maxim of law that "all acts in *pari materia* are to be taken together as if they were one law. It is contended that if the cause of action to establish title and that to recover arrears be taken to be different, there would be practically no limitation at all; but this contention is answered by showing that the fact that the plaintiff cannot get any arrears which are time-barred is the result of the law of limitation itself.

PER CURIAM :—This was a suit to recover three years of dues alleged to be owing to the plaintiff as hereditary Māhār of the village of Varvad within the Solápur District. The

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defendant, a cultivator of the same village, denied that the plaintiff was a hereditary Máhár and alleged that he had never paid him any dues. The Subordinate Judge found that the plaintiff was a hereditary Máhár but rejected his claim, first, because he was not entitled to dues without performing services, and secondly, because he had failed to prove that he ever received such dues from the defendant. The Assistant Judge, in appeal, reversed this decree holding, on the authority of a judgment of the Privy Council in *Beema-shanker v. Jamarjee* (*ubi supra*), that it was sufficient if plaintiff was ready and willing to perform service when required of him and that, as there was no doubt of the plaintiff's ownership, length of time alone would not be sufficient to bar his claim.

The Assistant Judge found as a fact that plaintiff had not proved any payments within 12 years and we have first to decide, on the question of limitation, whether or not that fact is a complete bar to this action. We are unable to say with confidence what the Assistant Judge means by the remark "as there can be no doubt of the plaintiff's ownership"; but we understand him to lay down this proposition that mere omission to pay or to demand such dues for any length of time, say 200 years, cannot *per se* operate to bar a right of action to recover as many years' arrears as are within the statutable period applicable to the case; in other words, that the cause of action to establish title, and the cause of action to recover a year's dues, which rests on such title, are totally distinct and independent of each other. If that were so, there would be no law of limitation, as was observed by the late Chief Justice of this Court in *Ráji Manor et al v. Desái Kaliánrí Hakumatrái* (*ubi supra*) but we think that the Assistant Judge has mis-apprehended the effect of the Privy Council judgment, which he quotes. The suit there was for the recovery of 24 years' arrears of fees incident to the offices of Muzmoodar, Parekh, and Metha; and the Judges of the Suddur Dewanee Adalat, from whose decision the case went up in appeal, had held that the plaintiffs were entitled to recover 12 years' arrears. The conten-

tion of the defendants, who were appellants before the Privy Council, was, amongst other things, that the claim was barred *in toto* by Sec. I., Reg. V. of 1827, or that, at all events, it should be reduced to the amount of 6 years' arrears, under the 3rd section of that Regulation; while the plaintiffs insisted that their claim ought to have been extended to the whole of the 24 years, by virtue of the provisions of the 1st section. Thus, then, two questions of limitation were before their Lordships; one relating to the title to the hereditary office, and the other having reference to the extent of arrears recoverable. Section I. was, no doubt, applicable to the first question, according to the ruling of the Privy Council in another case, to the effect that it provided for limitation of suits, as well as titles by prescription. Seeing, therefore, that it was not pretended the plaintiffs had been out of enjoyment for more than 24 years, it is not easy to understand what objects the appellants had in resorting to a provision of the law, which allowed 30 years; however, it may be presumed that the point was not seriously argued, or, if argued, that no consideration was given to it; for it is clear that the remarks, which occur in the judgment, on the scope and effect of the 1st section, had reference solely to the contention of the respondents, founded upon it. We are unable to find any thing in the said judgment which supports the view the Assistant Judge has adopted, and it would certainly require a very strong and very clear expression of opinion to induce us to depart from the principle, uniformly acted on by this Court, that where there has been no recognition of title, nor any payment of dues claimed within the period of limitation prescribed by law, there is a sufficient bar to the claimant's right to recover, if he ever had any. We find, therefore, that the present suit is barred and, accordingly, reverse the lower Court's decree and confirm that of the Court of first instance. All costs on respondent.

Decree accordingly.

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[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 50 of 1871.

SHBINIVA'S UDPIRA'V *Appellant.*

L. REID, DISTRICT MAGISTRATE OF DHAR-

WAR; RANGRA'V BHIMA'JI, 1ST CLASS

SUBORDINATE MAGISTRATE, AND KRISH-

NARA'V HANMANT *Respondents.*

Privacy, invasion of—Opening new windows.

Where the plaintiff opened a new window in his house at Dharwar, which rendered the defendant's house less private than before :—

Held that the plaintiff was not guilty of any tortious act, and should not be debarred from improving his own house, though the effect might be, to some extent, prejudicial to his neighbour.

To establish such an exceptional privilege, as is customary in this respect in the towns of Guzerat, evidence of the most satisfactory character is necessary.

THIS was an appeal from the decision of Baron De H. Larpent, Acting Judge of Dharwar, rejecting the plaintiff's claim.

The facts of the case are briefly these :—

The plaintiff attempted to open a window in a wall of his house, and the third defendant resisted his doing so. The defendant also laid an information before the 2nd defendant, the 1st Class Subordinate Magistrate, who visited the spot and passed an order prohibiting the plaintiff from opening the window. This order, said to have been passed under the authority of Sec. 62 of the Code of Criminal Procedure, was confirmed by the 1st defendant, the Magistrate of the District. The plaintiff brought this suit to set aside the orders, and to have the 3rd defendant's obstruction removed.

The Judge found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, without his permission, and that, as a matter of fact, the plaintiff's making an opening in his wall would expose to view the women of the defendant's household, when they bathed at a well in the compound. He, therefore, decided against the plaintiff.

The appeal to the High Court was heard by GIBBS and LLOYD, JJ.

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Rāvsāheb V. N. Mandlik (with him *Ganpatráv Bhāskar*) appeared for the appellant:—The law will not prevent a person from doing as he likes with his property, unless his doing so causes actionable wrong. Except in Guzerat, where, following a long course of decisions, the Court has been obliged to recognize a custom, it has been held, throughout the Presidencies of Bengal, Madras, and Bombay, that no suit will lie to have a window closed up, even though the defendant's privacy is invaded. See *Gibbon v. Abdulur Rahim* (a); *Mahomed Abdulur Rahim v. Birju Sahu* (b); *Dādā Valibhái v. Hargovan Vanmáli* (Special Appeal No. 307 of 1871 decided by MELVILL and KEMBALL, JJ., on the 15th September 1871); *Kanku Punjá v. Bhavāni Dhumá* (Special Appeal No. 339 of 1871 decided by MELVILL and KEMBALL, JJ., on the 29th November 1871); and *Komáthi v. Gurunada Pillai* (c). There is, besides, in this case no evidence, such as the Hindoo law requires, to prove a usage See *Cole: Dig.*, Vol. I., pp. 69-99, Madras (3 edn.).

L. REID, DISTRICT MAGISTRATE OF DHARWAR; RANGRA'V BHIMA'JI, 1ST CLASS SUBORDINATE MAGISTRATE, AND KRISHNARA'V HANMANT.

Dhirajlál Mathurádás (Government Pleader), with him *Nánābhái Haridás* and *Pándurang Balibhadra* for the special respondent, referred to *Kuvarji v. Bai Javer* (d) and *Manishankar v. Trikam* (e).

LLOYD, J.:—In this case the plaintiff Shrinivásráv sued the Magistrate and 1st Class Subordinate Magistrate of Dharwar and one Krishnaráv Hanmant to have the order of the 1st and 2nd defendants, directing a window which he (plaintiff) had recently opened in his cook-room to be closed up, cancelled, and also to have the obstruction of the 3rd defendant to his (plaintiff's) opening the said window removed.

The Judge of Dharwar, in whose minute the particulars of of the case are fully set forth, decided that the order passed

(a) 3 Ben. Law, Rep. A. J. 411.

(b) 5 Ibid 676.

(c) 3 Mad. H. C., Rep. 141.

(d) 6 Bom. H. C., Rep. A. C. J., 143.

(e) 5 Ibid 42.

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 BHIMA'JI, 1ST
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 DINATE MA-
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 AND KRISH-
 NARA'V HAN-
 MANT.

by the First Class Subordinate Magistrate and confirmed by the District Magistrate was issued under legal authority, and that it did not constitute a cause of action against those officers, and with respect to the third defendant the Judge found that the plaintiff's new window interfered with his privacy, and that according to the custom of the country, no one could make a new aperture in his own wall which might invade the privacy of his neighbour without that neighbour's permission, and he, therefore, considered that the plaintiff should be restrained from building the new window and he, accordingly, threw out the claim.

The plaintiff brings this appeal against all three original defendants.

On its being intimated to the appellant's Vakil that the Court was of opinion that the Judge below was right as to the non-liability of the first and second defendants to this action, he did not press the first point raised in the appeal, so that we may pass on to the other chief points which seem to be :

Whether, in the exercise of his undoubted right to improve his own property, the plaintiff has done that to which the defendant can legally object ? and

Whether there is a local custom prevailing in Dharwar which should operate to prevent the plaintiff opening the window in question ?

It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, render the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt some arrangement by which the inconvenience arising therefrom, if any, may be avoided ; and it is more reasonable that the defendant should protect himself than that the plaintiff should be debarred from improving his own house, for, as was observed by Mr. Justice Markby in the case reported at page 676, vol. V. B. L. R., " to hold that privacy is a right and the invasion of it an injury would lead, as it appears to

me, to the most alarming consequences to the owners of house property in towns."

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v.

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TRICT MAGIS-TRATE OF
DHARWAR;
RANGRA'VBHIMA'JI, 1ST
CLASS SUBOR-
DINATE MA-
GISTRATE,
AND KRISH-
NARA'V HAN-
MANT.

It has been recently held by this Court (Special Appeals Nos. 307 of 1871 and 339 of 1871) that the mere opening of a door in a person's own premises does not constitute a cause of action, and after consulting all the authorities that have been referred to, we think, unless we can coincide with the Judge that the local custom has been established, the plaintiff should succeed. With reference to this alleged custom, it must be observed that it was not set up in the written statement, and though certain witnesses depose to the effect that it was not customary to allow doors and windows to be opened without permission, if the privacy of neighbours is thereby interfered with, it appears to us that their evidence is too vague, and that to establish the point it should have been shown that the custom was approved or immemorial, or that it had been judicially recognized.

The various decisions quoted by the Judge refer solely to a custom prevailing in towns in Gujerat, and this Court, as has before been said, would be very unwilling to extend this exceptional privilege without the most satisfactory proof that it prevailed elsewhere.

We, therefore, amend the decree of the lower Court and order that the obstruction, made by the third defendant to the plaintiff's opening the window in question, be removed, and direct that the plaintiff pay the costs of the Magistrate and 1st Class Subordinate Magistrate, and that all other costs in this suit be paid by the defendant.

Decree accordingly.

1872.
July 25.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 585 of 1871.

SUGANCHAND SHIVDA'S and others *Plaintiffs.*

MULCHAND JOHA'RIMAL *Defendant.*

Cause of action—Whole cause of action—Hundi—Action against indorser—Jurisdiction—Letters Patent, High Court, Cl. 12.

The contract that the indorser of a *hundi* enters into is to pay the amount of the *hundi* to the holder (in case the drawee makes default) in the place where the *hundi* has been indorsed by him and not in the place where it is made payable.

Where, therefore, a *hundi* indorsed and delivered in Ajmere was payable in Bombay where it was dishonoured, it was held that the cause of action of the holder against the indorser did not arise wholly in Bombay.

Whether it arose in part in Bombay—*Quære.*

THIS was a suit by the holders against the indorser of a Marwadi *hundi*.

The *hundi* was addressed by Kássidás Vanarsidá (the drawer) at Mandusar to Bháichand Jumakráam (the drawee) at Bombay and stated "Here (at Mandusar) there have been deposited by Vithaldás Manchhárám Rs. 2,500 which have been received. As to the time (for the payment) thereof do you pay the amount to 'Shah' after 45 days from the 6th of Vaisak Sud (26th April 1871). As to the mark appertaining to the same do you debit the amount to my (the drawer's) account."

The *hundi* was sold and indorsed over to Johárimál Gambhirmál, by him it was sent from Kota to the defendant at Ajmere in order that the amount might be recovered. It was there sold and endorsed by the defendant to Popsing Hardevdás, by whom it was sent to the plaintiffs in Bombay for collection. In Bombay it was presented for acceptance and payment, and was dishonoured and due notice was given to the defendant.

The defendant, in his written statement, alleged that he lived and carried on business at Ajmere, and had no place of business and no place of abode within the jurisdiction of the

High Court, and submitted that the cause of action did not arise within the jurisdiction, and that the suit ought to be dismissed with costs. He admitted the endorsement of the *hundi*, but alleged that it was made at Ajmere. He also set up a defence upon the merits.

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SUGANCHAND
SHIVDA'S
v.
MULCHAND
JOHA'RIMAL.

The case was set down for argument on the point of jurisdiction before GREEN, J., on the 25th of July 1872, when it was admitted by counsel for the plaintiff, that the indorsement of the *hundi* by the defendant had been made at Ajmere.

Ferran (with him *Latham*) in support of the jurisdiction:— I shall contend that in this case the whole cause of action (*i.e.*) the obligation and its breach arose in Bombay, and that therefore the Court has jurisdiction to try the cause and will rely upon the judgment of Holloway J. in the case of *DeSouza v. Coles* (a) and the later English decisions on the meaning of the expression "cause of action."* (GREEN, J.:—How do you say the obligation of the drawer or indorser is to pay in Bombay? Is not the obligation he undertakes an obligation to pay in the place where he draws or indorses?) I submit he is in the position of a surety; he undertakes to place the holder in the same position as he would be in if no default were made. The holder is entitled to be paid in the place upon which the *hundi* is drawn; but if the Court is against me on this point, it is useless for me to argue the other and more important question.

Marriott (with him *Pigot*) *contra*.—The contract that the drawer or indorser of a bill enters into is not to pay money in the place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee, and in default of such payment, they agree, upon due notice, to reimburse the holder in principal and damages at the place

*NOTE.—The English decisions on this point are conflicting, see *Sichell v. Borch* 2 H. & C. 954; *Allhusen v. Margarep*, L. Rep. 3 2 B. 340; *Jackson v. Spittall* L. Rep. 5 C. P. 542; *Durham v. Spence* L. Rep. 6 Ex 47; and *Cherry v. Thompson* L. Rep. 72 B. 573.

(a) 3 Mad. H. C. Rep. 384.

1872. where they respectively entered into the contract: *Potter v. Brown (b)*; *Allen v. Kemble (c)*; *Story's Conflict of Laws* para. 315.
 SUGANCHAND SHIVADAS
 v.
 MULCHAND JOHA'RIMAL. *Farran* in reply.

GREEN, J.—I must hold that the Court in this case has no jurisdiction. The contract that the indorser of a bill enters into is, in case the drawee does not pay, to pay the amount of the bill with interest in the place where he has indorsed the bill. In the present case, the bill, it is admitted, was indorsed by the defendant at Ajmere, and the obligation that the defendant is under is to pay at that place. As the leave of the Court has not been obtained under Clause 12 of the Letters Patent, I have no option but to follow the course adopted in *Framji v. Wallace (d)*, and direct the plaint to be returned to the plaintiff, and the plaintiff must pay the defendant his costs.

• *Order accordingly.*

Attorneys for the plaintiffs—*Dallas and Lynch.*

Attorneys for the defendant—*Rimington, Hore and Langley.*

[APPELLATE CIVIL JURISDICTION.]

July 31.

Miscellaneous Special Appeal No. 11 of 1872.

GANGA'RA'M VELJI *Appellant.*

PARBHU DAYA'RA'M *Respondent.*

Civ. Pro. Code Secs. 205 and 273—Wearing Apparel—Attachment.

Necessary wearing apparel is not liable to attachment under Sec. 205 of the Code of Civil Procedure.

THIS was a miscellaneous special appeal from the decision of W. H. Newham, Judge of the District of Súrat, confirming an order of the Subordinate Judge of Olpár.

A judgment creditor in execution of a decree of the Civil Court attached the necessary wearing apparel of his judgment

(b) 5 East 124. (c) 6 Moore P. C. C. 314. (d) 1 Bom. II. C. Rep. 113.

debtor who contended that it could not be attached. The Subordinate Judge having allowed his contention, the judgment creditor appealed to the District Judge who confirmed his order for the reasons stated in the following extract from his judgment :—

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GANGA'RA'M
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v.
PARBHU
DAYA'RA'M.

“This Section 205 of Act VIII. of 1859 would at first sight appear to exclude all exemptions of saleable property. It was considered in *Re Pestunji Cursetji Shroff (a)*, in which matter it was ruled that account books, not being saleable (except as waste paper), were to be exempted under the common law rule. Other exemptions are given in the cases quoted under the section in Broughton's Civil Procedure Code 4th Edn. p. 172, but do not bear on the present case.

“By the English law whatever is in the personal use or occupation of any man is for the time privileged, and protected from any distress, on account of the danger which might arise on a breach of the peace: 3 Stephen p. 342. See 1 Smith L. C. 6th edn, p. 385, under *Simpson v. Hartopp*. (In this case the clothes were attached on the debtor's body.) And wearing apparel is exempted from seizure under a writ of *fi fa* by 8 & 9 Vict., C. 127, Sec. 8. This section is quoted also in Pestanji's case this, however, is by the statute and not by the common law. * * * Section 205 does not specially exempt wearing apparel, but, according to the letter of that section, the Nazir of the Court was not bound to stop at appellant's dhotar (as he did in this case). He might have attached and removed every article of clothing he had on; and debt is not confined to the male sex. It is absurd to suppose that the framers of the code could have intended to legalize such a proceeding as I have indicated, and it may fairly be held that the above section was enacted subject to such exemptions founded on the common law as that quoted from Stephen. Ornaments into which money might be converted, or even costly clothing, call for no exemptions, even though on the debtor's person; but I consider that ordinary and necessary apparel, on the judgment debtor's

(a) 3 Bom. H. C. Rep. O. C. J. 42.

1872. person, is an article of property which should not be taken in execution."

GANGA RA'M

VELJI

"

PARBHU
DAYA RA'M.

The special appeal was heard by LLOYD and KEMBALL, JJ.

Ghanashám Nilkanth Nádkarni for the special appellant :—
Section 205 of the code makes no exemption in favor of wearing apparel. Wherever in the code, the Legislature intended to make any exemption, they have made it in express terms, for instance in Sec. 273, where the necessary wearing apparel of the person *arrested*, and that of his family, as well as the necessary implements of his trade, are excepted from seizure. The English law on the subject being founded upon statute, and not on the rules of common law, ought not to be applied. That law places a limit of £5 within which wearing apparel cannot be attached. So that the English law is essentially different from the Indian law on this matter. The principle on which, in the case of *Pestanjí Cursetji Shroff*, the account books were held not liable to attachment is that account books, as such, were not saleable, whereas wearing apparel, however trifling, is saleable as articles of clothing.

Nánabhái Hariddás for the special respondent :—The Legislature could not have intended that by the operation of the law any person should be deprived of all his clothing. Their intention might be gathered from the exception provided in Sec. 273 which by implication should be made applicable to Sec. 205. The Legislature could not place any minimum of wearing apparel in India, for it rises from the very smallest value to a very large sum. The Legislature, besides, could not have intended that if the judgment creditor attaches his debtor's person, he cannot lay hold of his clothing or implements of trade, but that if he does not choose to do that, and proceeds against his property only, he can take everything, even to the veriest rag. Such a proceeding would be against equity and good conscience. It is, besides, a question whether the creditor cannot be punished for abetting a public nuisance which an indecent exposure of person might be held to be.

PER CURIAM :—The Judge has found that the articles in question were ordinary and necessary apparel taken from the body of the respondent. It has been contended that because such articles are not exempted by Section 205, the appellant is entitled to have them attached; but when we look to Section 273, and find that in case of arrest a debtor who wishes to obtain his discharge is not compelled to give up his necessary wearing apparel, it would, we think, be contrary to reason to suppose that it was the intention of the Legislature under Sec. 205, which is merely descriptive of the character of the property to be attached, to compel the last rag upon his person to be given up. And this might be the effect if we were to hold that necessary wearing apparel is liable to attachment.

Order confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 146 of 1872.

August 1.

KRISHNA'JI NA'RA'YAN.....Appellant.

GOVIND BHA'SKAR and othersRespondents.

Hindu law—Mortgagee without possession—Suit to recover land—Māmlat-dār's order against mortgagor—Judgment not inter partes—Bombay Act V. of 1864.

In order that a Hindu mortgagee may successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. He can bring his action based upon the title of his mortgagor, if the mortgagor had a good title to the land, and was in possession of it within twelve years before the suit was brought.

A mortgagee is not affected by a Māmlatdār's order, made under Bombay Act V. 1864, on the application of the mortgagor for possession subsequent to the date of the mortgage.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnagiri, in Appeal No. 279 of 1870, reversing the decree of Mādhavrāy Shesgir, 2nd Class Subordinate Judge at Goolagur.

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 KRISHNÁJI
 NA'RA'YAN
 v.
 GOVIND
 BHA'SKAR.

Krishnáji brought the suit to recover possession from the defendants of certain "Agar" (land), and to obtain the removal of a house and a hut that were built on it. He alleged in the plaint that the property had been mortgaged to him by one Bagambhat under a deed of mortgage, dated 29th July 1863, and that he (Krishnáji) had been forcibly dispossessed by the defendants on the 1st August 1865.

The defences chiefly relied upon were (I) that the plaintiff had never been in actual possession of the property under his mortgage, and (II) that the suit was barred, not having been brought within three years from the date of a Mámlatdár's order, made on the 20th November 1865, under Bombay Act V. of 1864 on the application of the said Bagambhat. The order awarded possession to the defendants, and it was contended that as it bound the mortgagor Bagambhat, it also bound the plaintiff who was Bagambhat's mortgagee.

The Subordinate Judge held that the suit was not barred by limitation, as the Mámlatdár's award did not bind the plaintiff, he being no party to it. He also held that the property in dispute had been in the exclusive possession of Bagambhat and his mortgagee (Krishnáji) prior to the date of the dispossession by the defendants, and made a decree in favor of the plaintiff.

On appeal, the Subordinate Judge's decree was reversed on the ground that the Mámlatdár's order bound the plaintiff as Bagambhat's mortgagee and that, therefore, the suit was time-barred, not having been instituted within three years from the date of that order. The following were the reasons given by the Assistant Judge for his decision :—

"The points are (1) Is the claim barred by limitation ? (2) Is respondent's title proved ? * * * With regard to the first and second points, it is alleged by the respondent that the owner, Bagambhat, mortgaged the land to him in 1863, and put him in possession. Now it is not sufficient in this suit for the respondent to prove Bagambhat's title and the mortgage from him to himself, but he must prove that he was actually put in possession, otherwise

he cannot bring an action of ejectment like this. Now, I can find no evidence at all which proves this important point. * * * I cannot hold that the respondent has proved that he ever was in possession of this land, and, therefore, as, until he has got possession from his mortgagor, his title cannot be said to be perfected, he cannot bring this suit successfully. With reference to the remark of the Subordinate Judge on the point of limitation that the plaintiff, not being a party to the revenue award (41) is not affected by it, it appears that Bagambhat applied for possession against the appellants amongst others, and on the 20th November 1865 it was decided that the defendants were in possession, and had been so for six months and more previously. This shows that the respondent was not in possession. More than three years have elapsed from the date of that order to the date of this suit. I am very strongly of opinion that the respondent is bound by that decision. His mortgagor is bound by it clearly, and as far as he is concerned, the land is lost as the order cannot be set aside. It would be, I think, far from right that the mortgagee should have more rights than the mortgagor, and the effect would be that a man by mortgaging his land would be able to override altogether this rule of limitation. * * * I hold that the order of the Revenue Court is binding on the respondent, since though not a party to it, he is a representative, or privy of a party."

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The special appeal was argued before SARGENT, Acting C.J., and MELVILL, J. on the 1st August 1872.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Bhairavnáth Mangesh, for the respondent.

PER CURIAM :—The Assistant Judge was wrong in holding that the plaintiff could not bring his action, unless he had been actually in possession under his mortgage. If the mortgagor had been in possession within 12 years, and the mortgage gave the mortgagee the right to be put into possession, the mortgagee would be entitled to bring his action based

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KRISHNA'JI
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BHA'SKAR.

upon the title of his mortgagor, nor would he be affected by the circumstance of the mortgagor having subsequently made a fruitless attempt to recover possession on dispossession by the defendants, in the Mámlatdár's Court, and neglected to bring his suit within 3 years. The Court has found that the mortgagor has been in possession within 12 years; the action is, therefore, clearly not barred. The decree must, therefore, be reversed, and the case remanded to be tried on its merits, having regard to the above observations, respecting the mortgagee's title.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

August 8.

Special Appeal No. 570 of 1871.

MUHAMMAD YA'KCUB *Appellant.*

MUHAMMAD ISMAIL and others *Respondents.*

Khoti land—Suit by Khot against cultivator—Onus of proof.

In a suit by a Kabuláyatdár Khot for rent from cultivators holding land in a Khoti village, the *onus* does not lie on the plaintiff to prove the land to be Khoti; but the holder of land in a Khoti estate must prove that he is exempted from paying rent according to the custom of the country.

SP. APP. NO. 485 OF 1868 FOLLOWED.

THIS was a special appeal by the plaintiff from the decision of H. J. Parsons, Assistant Judge at Rutnágiri, in Appeal No. 61 of 1869, reversing the decree of the Subordinate Judge of Dapuli.

Muhammad Yákcub sued to recover rent for the year 1862-63 as a Kabuláyatdár Khot and alleged that the defendants were cultivators of some *thikáns* (fields) on a fixed rent.

For the defence, it was pleaded that the plaintiff must have first brought his suit to establish his right as a Khot, as alleged by him, before filing any action for rent.

The Subordinate Judge gave a decree in plaintiff's favour for part of his claim. But the Assistant Judge, in appeal, reversed that decree (12th September 1871) on grounds stated in the following extract from his judgment:—

1782.
 MUHAMMAD
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 v.
 MUHAMMED
 ISMAIL.

“ The point is, simply, first—is the land in question Khoti, so that the respondent can claim Thall or Maktá ?

“ The *onus*, of course, of proving that the lands are Khoti, lies on the respondent (plaintiff), (and I see Mr. Lyon held the same in Appeal 51 of 1869).

“ The Lower Court threw the *onus* on the defendants to prove the lands were ‘dhárá,’ but I am quite sure this is wrong. Mr. Lyon held the converse for reasons in which I quite agree, and I always thought that the person claiming must prove the tenure or the relationship under which he claims. In such a Khoti case as this, the claim simply rests on custom, that is, on the privity presumed to exist between a Kabuláyatdár Khot and the holder of Khoti lands. It is, therefore, absolutely necessary that the person suing for rent should show that this relationship, from which privity may be assumed, exists.

“ In the present case, there is no such evidence at all, and the plaintiff cannot succeed with his present claim for Khoti rent.”

The appeal was argued before GIBBS and KEMBALL, JJ., on the 8th August 1872.

Shántárám Náráyan for the appellant :—The Lower Court erred in holding that although the appellant was Kabuláyatdár for the year in dispute, yet the *onus* lay on him to prove that any particular land in the village of which he was such Kubuláyatdár was Khoti land, and that the tenant thereof was bound to pay “ Thall ” or “ Maktá ” (rent), whereas, by the custom of the country, all the holders of land in the village were bound to recognize the Kabuláyatdár as the managing Khot, and to pay to him rents due on their respective holdings, unless they could show a title to a total or partial exemption, or to a fixed amount of rent. It is an

1872. acknowledged fact that the appellant is the Kabuláyatdár
 MUHAMMAD Khot, and that the respondents are tenants of the land. That
 YA'KUB shows the relationship subsisting between him and the culti-
 v. vators.
 MUHAMMAD
 ISMAIL.

The respondents did not appear.

PER CURIAM :—The Court is of opinion that the Assistant Judge was wrong in laying the *onus* of proving the lands to be Khoti upon the respondent (plaintiff). In Special Appeal No. 485 of 1868, it was decided that it lay with the holder of lands in a “Khoti” estate to prove that he is exempted from paying rent for them according to the custom of the country. The Assistant Judge will, therefore, re-try the case with reference to the above remarks.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

August 13.

Special Appeal No. 179 of 1872.

NA'RO GANESH DA'TA'B *Appellant.*

MUHAMMAD KHA'N *Respondent.*

'Limitation—Implied contracts—Six years' limitation.

Where the defendant employed the plaintiff to repair a bungalow, but no express agreement was come to as to the payment for the repairs, it was held that on the performance of the repairs an implied contract to pay their fair value arose, for which the period of limitation was six years, as ruled in *Umedchand Hukamchand v. Sha Bulakidas Lalchand* (a).

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátára, in Appeal No. 60 of 1871, reversing the decree of Krishnaráv Vithal Vinchurkar, Subordinate Judge.

Náro Ganesh sued to recover from Muhammadkhán the cost of repairs made by the plaintiff to a bungalow belonging to the defendant. Náro alleged that in the months of May, June and July 1865, Muhammadkhán employed him (Náro) to make

(a) 5 Bom. H. C. Rep. O. C. J. 16.

the repairs and agreed that the bungalow was to remain in Náro's possession with power to let it and to apply the rent to the payment of the amount expended on the repairs ; that the bungalow was to continue in Náro's possession till the whole amount was paid off. The plaint further stated that the defendant violated this agreement by himself receiving the rent and refusing to hand over the key of the bungalow to the plaintiff. The suit was filed on the 31st October 1868, the plaintiff stating the cause of action to have arisen on the 1st November 1865, the day on which Muham-madkhán received the rent and refused to give the key.

The defendant, among other objections, pleaded limitation. The first court decreed the claim in plaintiff's favour, holding that the suit was not barred. In appeal, however, the District Judge reversed the decision, and held, "1st, that the plaintiff had nothing to do with collecting the rent of the house, letting it, or managing it, but that this was done by the defendant; 2nd, that the completion of the repairs, for which the plaintiff's claim has been made, was made before 31st October 1865, and more than three years before the suit was filed. The Subordinate Judge's decree therefore must be reversed."

The appeal was argued on the 13th August 1872 before SARGENT, Acting C.J., and MELVILL, J.

Vishnu Ghanashám for the appellant cited *Umedchand Hukamchand v. Sha Bulakidas, Lalchand* (b).

Bhairavnáth Mangesh for the respondent.

PER CURIAM :—The Judge was wrong in holding the claim barred. He has found that the defendant employed the plaintiff to do the repairs. This created an implied contract to pay their fair value, and for this the period of limitation is six years according to the rule laid down in the case at 5 Bom. H. C. Rep. p. 16, which has been acted upon too often to be now called in question. The case must be remanded for the Judge to assess the value of the repairs. Costs to abide the result.

Decree reversed and case remanded.

(b) 5 Bom. H. C. Rep. O. C. J. 16.

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GANESH
DA'TA'B
v.
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KHAN.

1872.
August 27.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 380 of 1871.

KURIA' BIN HANMIA' *Appellant.*

GURURA' and others *Respondents.*

Service Watan land—Successive life tenants—Cause of action—Practice.

Where land belonging to a service Watan held on a tenure of successive life estates had passed out of the possession of the Watandárs:—
It was held that a cause of action to recover such land accrued to each successive life tenant upon the death of his predecessor.

THIS was a special appeal from the decision, on remand, of C. F. H. Shaw, District Judge of Belgaum, in Appeal No. 278 of 1869, confirming the decree of the Subordinate Judge of Belgaum.

The suit was brought by Kuriá in 1864 for the purpose of recovering three survey numbers of land situate at Nundihalli. The defendants pleaded the statute of limitation. The Subordinate Judge threw out the claim as barred, holding the defendants to have been in possession of the lands for upwards of twenty years. In appeal, the decree was confirmed on the same ground.

The petition of special appeal contained, among other objections, a ground which had never been taken in the previous pleadings:—viz., that the Lower Court omitted to decide when the statute of limitation commenced to run, and whether or not, the lands being service Watan lands, the cause of action to the appellant arose on the death of his father under the provisions of Regulation XVI. of 1827.

The appeal was argued before SARGENT, Acting C.J., and MELVILL, J., on the 27th August 1872.

Bhairavnáth Mangesh for the appellant.

Dhirajlál Mathurádas, *contra*.

PER CURIAM:—We think that as the land in dispute belongs to a service Watan and is held on a tenure of successive life estates, the right to which accrues on the death of each life tenant, the plaintiff had no cause of action until

the death of Hanmiá and Parshiá in 1860 or 1861. If this point had been raised when the case was last before the Court, a remand would have been unnecessary. It has now been taken, and we are of opinion that it is a valid objection to the decree of the District Judge, which is accordingly reversed, and the claim is allowed with costs on the defendants throughout.

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Decree reversed with costs.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 207 of 1872.

Sept. 3.

RAMA'BA'I, wife of BHIKA'JI BHA'SKAR *Appellant.*
TRIMBAK GANESH DESA'I, and another ... *Respondents.*

Hindu Law—Maintenance of deserted wife—Jurisdiction—Small Cause Court—Extraordinary Jurisdiction of High Court.

Although the relations of the husband of a Hindu woman, deserted by him, may not be under a personal liability to support her, yet, if they have property of the husband in their hands, his wife is entitled to be maintained out of the husband's estate to the extent of the proceeds of one-third thereof.

Whether a suit to obtain such maintenance is cognizable by a Court of Small Causes. *Quære.*

Where there has been a manifest error of law, and to prevent manifest injustice, the High Court, in the exercise of its extraordinary jurisdiction, will remand a case to the Lower Court, though the value of the claim may be under Rs. 500, and the case may be one in which a special appeal is not allowed.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of Ratnágiri, reversing the decree of the Subordinate Judge of that place.

The plaintiff, Ramábái, brought the suit to recover maintenance and house-rent from the defendants, Trimbak and Krishnáji, respectively, her husband, Bhikáji's, cousin and cousin's son, alleging that they and her husband were members of an undivided family, and that her husband lived with them till six years before the time of suit filed, when

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he left the country and was not afterwards heard of; that her husband had a right to a share in the ancestral property in the hands of the defendants, and that she, as his wife, had a right to be maintained out of it, but that the defendants refused to maintain her and her minor son.

Trimbak appeared and answered that Ramábái could not maintain this suit in her husband's lifetime; that the family separated about 30 years ago, and that the defendants were not liable under Hindu law to maintain the plaintiff.

The Subordinate Judge found that the family was undivided; that Ramábái's husband had not been heard of since his departure, although search had been made for him; and that Ramábái was in poor circumstances, and had no means of support. He made a decree in the plaintiff's favor for Rs. 122. On appeal, the Assistant Judge reversed that decree, holding that the plaintiff could not be presumed to be a widow, and that a wife could not claim maintenance from her husband's relations. The Assistant Judge was of opinion that the conduct of the defendants in keeping the wife destitute was disgraceful.

The special appeal was heard by SARGENT, Acting C.J., and MELVILL, J., on the 29th of August 1872.

Rávsáheb Vishvanáth Náráyan Mandlik for the appellant.

Mánikbhái Jehāngirshá for the respondents took the preliminary objection that, as the value of the claim was below Rs. 500, a special appeal did not lie to the High Court, and *Rámchandra Dikshit v. Sávitribái* (a) and *Judal v. Hirá Mulji* (b) were cited as authorities.

Rávsáheb Vishvanáth Náráyan Mandlik contended that a special appeal lay, but asked the Court, in case no special appeal lay, to exercise its extraordinary jurisdiction, as the conduct of the defendants had been found to be disgraceful, and the authorities were clear to show that the wife was entitled to maintenance: S. A. No. 13 of 1861; *Trimmappa Bhat*

(a) 4 Bom. H. C. Rep. A. C. J. 73.

(b) Ibid 75.

v. *Parmeshriamma* (c) ; 1 Norton's Leading Cases, pp. 31 and 37 ; 1 Strange's Hindu Law, p. 67, 2 Ibid 45-51 ; and Digest of Hindu Law, by *Shamchurn Sirkar*, p. 368 and 369 ; *Bai Lakshmi v. Lakmidas Gopaldas* (d).

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PER CURIAM:—A preliminary objection has been taken by the respondents that this is a suit of a nature cognizable by a Court of Small Causes, and that, therefore, a special appeal is not admissible. Two cases, reported at pp. 73 and 75 of Vol. 4 Bom. H. C. Reports, have been cited in support of this objection. The learned Judges, by whom those cases were decided, have recorded no reasons for holding that a suit for maintenance by a Hindu widow is cognizable by a Court of Small Causes. The claim in those cases was by a widow, while in the present case it is by a deserted wife ; and it might be possible to draw a distinction between the nature of the two claims. But we think it unnecessary to do this, or to express any opinion as to the correctness, or otherwise, of the decisions above referred to. Assuming that the present claim would be cognizable by a Court of Small Causes, we still think that this is a case in which we should interfere by the exercise of our extraordinary jurisdiction. It has been the practice of this Court to use that power in cases in which there has appeared to be a manifest error of law, entailing manifest hardship on one of the parties to a suit. In the present case, the Assistant Judge speaks of the appellant's case as one of great hardship, and describes the conduct of the respondents as disgraceful ; and we are clearly of opinion that, in rejecting the appellant's claim, the Assistant Judge has proceeded upon a misconception of the law.

No doubt, the authorities do not show that the relations of a deserted wife are under a personal liability to maintain her ; but they do show that she is entitled to be maintained out of her husband's property to the extent of one-third of the proceeds of that property. The appellant's allegation is that her husband's property is in the hands of the respondent.

1872. ents and available for her maintenance. If the plaintiff's husband and the respondents are separate, and the former has taken his share of the property, the appellant has no claim upon the respondents; but if they are undivided, and the husband's share is available in the hands of the respondents, and the proceeds thereof are not accounted for by them, then the appellant is entitled to receive maintenance from those proceeds to an extent not exceeding one-third of the amount.

Decree reversed and the case remanded,

[APPELLATE CIVIL JURISDICTION.]

Sept. 4.

Special Appeal No. 330 of 1871.

RA'YASANGJI SHIVSANGJI *Appellant.*

GULA'M RASUL and others *Respondents.*

Jurisdiction—Appeal—Bombay Civil Courts Act (XIV. of 1869) Sec. 26.

Where a suit, wherein the subject matter exceeded Rs. 5,000, was instituted in the Court of a Principal Sadr Amin, but decided by a Subordinate Judge 1st Class appointed under the Bombay Civil Courts Act XIV. of 1869 :—

It was held that an appeal lay direct to the High Court under Sec. 26 of the Act.

THIS was a special appeal from the decision of F. D. MELVILL, Judge of the District of Ahmadabad, confirming the decree of the Subordinate Judge First Class of that city.

The facts, in so far as they are material, are as follows:—

A suit, the subject matter in which involved a sum exceeding Rs. 5,000 in value, was instituted, on the 10th of March 1868, in the Court of the Principal Sadr Amin of Ahmadabad. While the suit was pending, the Bombay Civil Courts Act (XIV of 1869) came into operation on the 19th of March 1869, and the Court of the Subordinate Judge First Class succeeded the Court of the Principal Sadr

Amin. In July of the same year, the Subordinate Judge pronounced his decision in favor of the defendants. The plaintiff filed an appeal in the Court of the District Judge who disposed of it on the merits by confirming the decree of the Court below.

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The special appeal was heard by MELVILL and KEMBALL, JJ.

Macpherson (with him *Nánabhái Haridás*) for the appellant.

Anstey (with him *Dhirajlál Mathurádas*, Government Pleader) for the respondents.

The judgment of the Court was delivered by

MELVILL, J.:—This is an appeal in a suit, the subject matter of which involved a sum larger than Rs. 5,000. It was instituted, on the 10th of March 1868, in the Court of the Principal Sadr Amin of Ahmadabad, and was pending on the 19th of March 1869, the day on which the Bombay Civil Courts Act came into operation. It was decided by the Court of the Subordinate Judge which succeeded the Court of the Principal Sadr Amin. In the case of *Girdharlál Har-govandás v. Amritlál Khusálchand* (S. A. No. 240 of 1871) decided by this Court on the 6th of September 1871, a case which is on all fours with the present, we held that as the original suit, involving a sum over Rs. 5,000, had been decided by a First Class Subordinate Judge after the Civil Court's Act came into operation, the District Judge had no jurisdiction to try the appeal. We proceeded upon the clear wording of Section 26 of that Act which says: "In all suits decided "by a Subordinate Judge of the First Class in the exercise "of his ordinary and special original jurisdiction, of which the "amount or value of the subject matter exceeds five "thousand rupees, the appeal from his decision shall be "direct to the High Court." Upon these words we thought that there could be no doubt that the appeal lay to this Court.

It has been to-day contended that because this suit was instituted or commenced before the Bombay Courts Act

1872. came into operation, Section 26 does not apply, and the case of *Ratanchand Shrichand v. Hanmantrav Shivabakas*, 6 Bom. H. C. Rep. A. C. J. 166 has been relied upon. That case is distinguishable from the present. There the first decision was passed before the Civil Courts Act came into operation. It was a decision not of a Subordinate Judge, but of a Principal Sadr Amin, and it was, therefore, clear that Sec. 26 could not be held to apply. We had next to consider whether the right of appeal had been taken away altogether, inasmuch as the Regulation which gave the right of appeal had been repealed. We came to the conclusion that, as no express provision had been made in the Bombay Courts Act with respect to appeals in suits decided before its passing, the mere repeal of the Regulation was not sufficient to take away the right of appeal. In support of this conclusion we cited Section 6 of the General Clauses Act I. of 1868. In the course of his judgment COUCH, C. J., said: "It follows, in the judgment of the Court, that in all suits commenced before the passing of the Bombay Courts Act, the procedure must (*unless another mode of procedure is expressly substituted by that Act*) be the same as it would have been, "if that Act had not been passed." The words in italics are those which distinguish that case from the one now before us. In that case there had been merely a repeal of the law regulating the mode of procedure. In the present case there has been something more, viz. an express substitution of a new mode of procedure.

We shall, therefore, annul the decree of the District Court for want of jurisdiction. As, however, the District Court ought to have discovered the error, and returned the appeal for presentation in this Court, we shall allow the appellant to file a regular appeal in this Court on the same stamp.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

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Sept. 4.*Miscellaneous Special Appeal No. 4 of 1871.*

VA'SUDEV VISHNU, a Minor, by his Mother
and Guardian RAMA'BA'I.....*Appellant.*

NA'RA'YAN JAGANNA'TH.....*Respondent.*

*Minor—Representation of minor in a suit—Proceeding in the nature of a
suit—Award—Civ. Proc. Code, Sec. 327—Act XX. of 1864, Sec. 2.*

As proceedings taken to file and enforce an award under Sec. 327 of the Civil Procedure Code are of the nature of a suit within the meaning of Sec. 2 of Act XX. of 1864, a minor must be represented in such proceedings by a person holding a certificate of administration.

THIS was a miscellaneous special appeal from the order of the Hon'ble G. A. Hobart, District Judge of Khandesh, in Miscellaneous Appeal No. 16 of 1870, confirming the order of the First Class Subordinate Judge at Dhúlia.

Naráyan Jagannáth filed in the Court of the Subordinate Judge at Dhúlia an award made in his favour by arbitrators appointed without the intervention of a Court. The award bore date the 27th August 1867, and was filed in the Subordinate Court on the 21st October 1867 for enforcement against the minor, Vásudev Vishnu, and another, under the provisions of Sec. 327 of the Civil Procedure Code. The minor, Vásudev, was represented by one Bháskar Vásudev who held no certificate of administration under Act XX. of 1864. The Subordinate Judge, after notice to the parties, ordered the award to be enforced. In appeal, the District Judge confirmed the order of the Court of first instance.

In the petition of special appeal it was urged, among other objections, that Bháskur Vásudev, holding no certificate of guardianship, had no authority to proceed in the case as representative of the minor Vásudev.

The appeal was argued before MELVILL and KEMBALL, JJ., on the 4th September 1872.

Shántárám Náráyan for the appellant.

1872. *Macpherson* (with him *Vishwandath N. Mandlik*), for the respondent.

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PER CURIAM :—This is an appeal against an order of the District Judge of Khandesh, directing execution against the applicant of a decree passed on an award. It appears that the proceedings, which Section 327 of Act VIII. of 1859 requires to be taken on an application to file an award, were taken when the applicant, who was, and still is, a minor, was not represented by a person holding a certificate of administration. He could not, therefore, be heard against the application, the proceedings on which were of the nature of a suit (Section 2, Act XX. of 1864). It follows that there is no valid decree against the applicant, and that the order for execution, which is appealed against, must be set aside so far as it affects him.

Order annulled with costs.

[APPELLATE CIVIL JURISDICTION.]

Sept. 11.

Appeal from Parsee Matrimonial Court.

ARDESAR JAHÁ'NGIR FRA'MJI *Appellant.*

AVÁ'BA'I..... *Respondent.*

Restitution of conjugal rights—Parsee Marriage and Divorce Act (No. XV. of 1865), Secs. 36 and 40—Civ. Proc. Code, Sec. 200—Execution of decree.

A decree for restitution of conjugal rights under the Parsee Marriage and Divorce Act is enforceable only in the manner provided in Section 36 of the Act; such provision is in substitution of, and not in addition to, the ordinary remedies provided by Sec. 200 of the Code of Civil Procedure.

THIS was an appeal from an order made by MELVILL, J., while sitting as Judge in the Parsee Chief Matrimonial Court at Bombay, on the 29th June 1871.

Ardesar Jahángir obtained a decree against his wife, Avábái, on the 29th March 1869, directing her to return to her husband and to render to him all conjugal rights. Avábái did not return to her husband in obedience to this decree,

and, on the application of Ardesar, was, on the 2nd of April 1870, committed to jail for one month, under Section 36 of the Parsee Marriage and Divorce Act, for disobedience of the decree. Avábái underwent the month's simple imprisonment, but, upon its expiration, refused to return to her husband. Ardesar again applied for the execution of his decree, under Sec. 200 of the Civil Procedure Code, and on the 27th April 1871 obtained a *rule nisi*, calling upon Avábái to show cause why she should not be ordered immediately to return to her husband, and to render him all conjugal rights, or, in the event of disobedience, why she should not be dealt with according to law.

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The rule was argued before MELVILL, J.

Macpherson showed cause against the rule.

Atkinson, Sergeant, was heard in support of it

Cur. adv. vult.

MELVILL, J:—This is an application for the execution of a decree, dated 29th March 1869, by which the defendant was directed to return to the plaintiff, and to render to him all conjugal rights.

The defendant was, on the 2nd April 1870, committed to prison for one month for disobedience of this decree, under the provisions of Section 36 of the Parsee Marriage and Divorce Act, 1865. Since her release she has been residing with her father in Bombay, and, until the present application, no further step has been taken to enforce obedience to the decree.

At the hearing, having been informed that this application was for execution under the Code of Civil Procedure, and not for a second order under Section 36 of the Parsee Marriage and Divorce Act, I directed that the application should be amended in accordance with the provisions of Section 212 of the Code. As it now stands, it is an application for the arrest and imprisonment of the defendant in execution of the decree.

It may be taken as settled that disobedience to the order of a court, directing a wife to return to cohabitation, is or-

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dinarily enforceable under Section 200 of the code by imprisonment, or attachment of property, or both: *Chotun Beebee v. Ameerschund (a)*, *Koobur Khansama v. Jan Khansama (b)*, *Moonshee Buzloor Ruheem v. Shumshoonissa Begum (c)*. If the wife can obtain her discharge, under Section 280 by the surrender of her property (a point which I am not called upon to decide) it is clear that the remedy provided in Section 200 is a very inadequate one for its purpose, but such as it is, it is the only remedy which the code provides.

By Section 40 of the Parsee Marriage and Divorce Act, it is enacted that "the provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act."

The question, which I have to decide, is whether the general application of Section 200 of the code to decrees for the restitution of conjugal rights is, in the case of Parsees, superseded by the special provisions of Section 36 of the Parsee Marriage and Divorce Act, which provides that "if such decree shall not be obeyed by the party against whom it is passed, he, or she, shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both."

It is to be regretted that this section (which has already given rise to much doubt and discussion on the question whether the penalty mentioned is to be enforced by the court making the decree or by a magistrate) was not drafted in such a manner as to indicate more clearly the intention of the Legislature (*Reg. v. Dosabbhai Framji*). As it is, there is nothing in the Act to show whether the Legislature intended that the punishment provided in Section 36 should be in addition to, or in substitution for, the ordinary remedies provided by Section 200 of the Code of Civil Procedure. If the imprisonment and fine, which may be awarded under Section 36, were intended simply as a punishment for an offence, simply as a mode of vindicating the dignity of

(a) 6 Calc. W. Rep. Civ. R. 105.

(b) 8 Ibid 467.

(c) 11 Moo. Ind. App. 551.

the court, then I see no reason why the party aggrieved by the disobedience to the decree should not have his civil remedy. But if, on the other hand, such imprisonment and fine were intended to operate solely in satisfaction of the decree, or in satisfaction of the decree as well as *in pœnam* for the contempt, then the party aggrieved has no remedy beyond that specifically provided.

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Now, though the words of the section do, to some extent, favor the former of these two suppositions, they do not do so clearly as to outweigh, in my mind, the antecedent improbability that the Legislature should have had any such intention. I can conceive no reason why the Legislature should have considered that a decree for the restitution of conjugal rights should be not only enforceable by the ordinary civil process, applicable to decrees for the performance of particular acts, but should be also punishable by a special additional punishment, which is not provided for disobedience of any other similar decree. On the other hand, I can conceive many reasons why the Legislature should have considered that disobedience of an order to return to cohabitation should be punished, and obedience enforced, by less severe penalties, and less stringent measures, than disobedience of an order for the performance of any other act. The suit for the restitution of conjugal rights is not one which commends itself to all minds, and has not found a place in the judicial system of all nations. Closely as the Americans have in general followed the English law, they have deliberately excluded from their system the suit for the restitution of conjugal rights. "Over England," says an American writer (Bishop on Marriage and Divorce, 4th ed., vol. i., p. 30) with national grandiloquence—"Over England, but not over this country, walks still that spawn of a dark age whose mission it was to keep unconjugal sinners in the strait performance of holy matrimonial duties, termed the suit for the restitution of conjugal rights." The Scotch enjoin "adherence," but it does not appear that they enforce a reunion against the wife or against the husband, when hateful to either. The Code

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Napoleon, which governs the greater part of Europe, has no process for compelling the cohabitation of discordant couples, or for constraining them, as Blackstone sarcastically remarks, "to come together again if either party be weak enough to desire it contrary to the inclination of the other." I take these remarks from Mr. Macqueen's work on the law of marriage and divorce (pp. 314—315)—"No French lawyer," he says, "ever proposed the rude expedient of a prison" (although the French law reprobates matrimonial severance more strenuously than the English law does) "nor would it be just to say that any English lawyer deliberately recommended a thing so palpably tyrannical and futile." He arrives at the conclusion that even in England there is now no legal process that can prevent desertion or compel cohabitation. In this he seems to be mistaken; for there can be no doubt that the Court for Divorce and Matrimonial causes has the same powers which the Court of Chancery formerly exercised on the requisition of the Ecclesiastical Courts; and in the case of *Cherry v. Cherry* (d) a writ of attachment was actually granted (though not executed) against the respondent who refused to return to her husband. But, however this may be, it is certain that even in England, where suits of this description have always been allowed, the action of the courts in enforcing their decrees has been very hesitating and uncertain. By the Canon law, from which the suit for the restitution of conjugal rights was derived, the court could compel cohabitation in every sense of the term. Before the Reformation, however, the courts were generally content to enforce their decrees by spiritual reprehension and excommunication; means which would commend themselves to a large class of the natives of this country, and, if they could be applied, would perhaps have more efficacy than any other remedy. When the Ecclesiastical Courts lost much of their authority, they had to invoke the aid of the Court of Chancery;—and upon a *significavit* from the Ecclesiastical Court that a party was in contempt, the Court of Chancery would proceed to enforce obedience by attachment

(d) 29 L. J. P. D. & M. 141.

and sequestration. But the paucity of reported cases shows how seldom this power was exercised, and I can only find one case—*Barlee v. Barlee* (c)—in which severity against a recusant wife was carried to an extreme.

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Now, it is not my business, nor, in the remarks which I have made, do I intend to criticise the policy of the Legislature in introducing into the Parsee Marriage and Divorce Act the suit for the restitution of conjugal rights. That measure was in accordance, not only with the English law, but also with the feelings of the Parsee community; for the Draft Bill, on which the Act was founded, was drawn up by a commission composed equally of Europeans and Parsees. But in endeavouring, as I am obliged to endeavour, to conjecture what were the intentions of the Legislature, I think that I may fairly refer to considerations which must have been present to the minds of the framers of the Act, and could hardly have failed to influence them. They must have known that the duty of cohabitation, which they were determining to enforce, is regarded in most systems of law as a duty of imperfect obligation, and not to be enforced by courts of law. They must have known that in England it has been enforced hesitatingly, and not without strong protest by those who have thought and written on the subject. It could not have failed to occur to them that to force a woman to live with a husband whom she detests can be of no real benefit to him: and to punish her with extreme severity for refusing to do so is only to make our courts the instrument of the husband's revenge. It could hardly have occurred to them that the dignity of a court required that this particular act of disobedience should be punished more severely than any other act of disobedience. And, therefore, it seems to me that in the minds of the framers of this Act, there must have been present many considerations which would induce them to mitigate, and none which would induce them to increase, the penalties by which cohabitation might be enforced under the general provisions of the Code of Civil Procedure.

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It cannot be said that a measure of exceptional severity may have been thought necessary in order to satisfy the wishes of the Parsee community, for in the Draft Bill, to which I have referred as having been drawn up partly by the representatives of that community, refusal to render conjugal rights was declared to subject the offender to only a pecuniary penalty. The framers of the Act seem to have preferred to follow the English law in regard to the nature, though not in regard to the extent, of the penalty by which obedience should be enforced, and disobedience punished. The writ *de contumace capiendo* may be regarded as a commitment in execution, as well as for contempt, and may be satisfied by the husband waiving his rights, as well as by the wife obeying the monition, and so purging the contempt. The penalty provided in Section 36 of the Parsee Marriage and Divorce Act appears to be of the same nature, but it differs from the English process, inasmuch as a definite term is fixed for its duration. Under the English process the duration of imprisonment to which an obstinately recalcitrant wife might be subjected is unlimited, and in the case of *Barlee v. Barlee*, to which I have already alluded, the wife was actually confined, until, as it is stated, she became a lunatic. The framers of the Parsee Marriage and Divorce Act may well have recoiled before such a precedent, and may reasonably have considered that it was not desirable to subject a wife even to imprisonment for so long a period as two years to which she would be liable under the Code of Civil Procedure. The contempt of court would certainly be sufficiently punished by the same punishment (simple imprisonment for one month and a fine of two hundred rupees) which may be awarded under Section 100 of the Indian Penal Code for disobedience of an order promulgated by a public servant, and which under Section 163 of the Code of Criminal Procedure all courts can inflict for a contempt committed in the presence of the court. And, on the other hand, regarding the commitment as a process in execution, it might well be considered that if imprisonment for a month would not induce a woman to overcome her dislike to her husband, it would be cruelty to attempt to force her to "the lowest degradation

of a human being" (I refer to Mr. John Stuart Mill's remarks in his Essay on the Subjection of Women, p. 57) by a further prolongation of her imprisonment.

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On the best consideration, then, which I am able to give to the matter, I am of opinion that the intention of Section 36 of the Parsee Marriage and Divorce Act is that the penalty therein provided should operate not only as a purging of the contempt, but in full satisfaction of the decree.

This view seems to be in accordance with that adopted by the High Court (ARNOULD and WESTROPP, JJ.) in the unpublished case of *Regina v. Dossabhai Framji*, to which I have already alluded. In that case Sir J. Arnould is stated, in the newspaper report of the case, to have said—"Section 40 of the Parsee Marriage and Divorce Act vested in the Parsee Matrimonial Court the powers given by the Code of Civil Procedure, and as one of the sections of the Code of Civil Procedure—viz., the 200th—gave the power of enforcing, by imprisonment or attachment, decrees for the performance of particular acts, it appeared to him that the words which formed the conclusion of Section 36 of the Act merely altered the mode in which the Court should enforce its own decrees, and punish a contempt or any disobedience of its decrees, the alteration being in effect that the punishment should consist, not of simple imprisonment and attachment but of simple imprisonment and fine." Mr. Justice Westropp is stated to have added that he concurred in the observation of Mr. Justice Arnould in reference to the bearing which Section 200 of the Civil Procedure Code had upon the 36th section of the Act. The Court seems to have held that the penalty provided in Section 36 was not a penalty for an offence, but a process in execution, as well as for contempt; that as such it was a process to be enforced, not by a magistrate, but by the court which made the order; and that it was in alteration of, and, therefore, in substitution for, the penalties provided by Section 200 of the Civil Procedure Code.

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Mr. Serjeant Atkinson, in support of the rule, has relied upon the case of *in re Boyce* (f) in which it was held that, under Stat. 9 & 10 Vict., c. 95, a defendant is liable to be committed repeatedly upon the same judgment. It appears to me that that case would be more in point, if the present application were for a second order of commitment under Section 36 of the Parsee Marriage and Divorce Act. Now, it is true that after much discussion in Westminster Hall, it has been held that a commitment under 9 & 10 Vict., c. 95, Section 98, is in the nature of a qualified execution, and not by punishment for contempt: *Kinning's case* (g), *Swann v. Dakins* (h). But in *in re Boyce* there had been, previous to each commitment, a fresh summons and a fresh default; and, moreover, as pointed out by the learned Serjeant himself, the statute contains express provision (9 & 10 Vict., c. 95, s. 103) that no imprisonment under the Act shall in any wise operate as a satisfaction or extinguishment of the debt. The learned Serjeant argued that this provision was inserted *ex majore cautela* and was merely declaratory; but it seems to me that, were it not for this provision, a commitment under Section 98, being by way of execution, would operate to discharge the debt. The Parsee Marriage and Divorce Act contains no similar provision, and, therefore, if any argument can be founded on a comparison of that Act with the English County Courts Act, it is rather to the effect that the framers of the former Act omitted the provision above referred to, because they intended that a commitment under Section 36 should operate in satisfaction of the decree.

The rule must be discharged with costs.

Against this order Ardesar preferred the present appeal.

It was argued before SARGENT, Acting C.J., and GREEN, J., on the 24th of July 1872.

Atkinson, Serjeant, (with him *Pándurang Balibhadra*) for the appellant:—There are no antecedent improbabilities in this case to lead us to believe that the words of Sec. 36 of

(f) 2 E. & B. 521.

(g) 16 L. J. Q. B. (N. S.) 257 (h) 24 L. J. C. P. (N. S.) 131.

the Act should be construed otherwise than in accordance with their literal meaning. The analogy drawn by the learned Judge from the institutions of other countries, has misled him ; for these institutions are not as stated by him, and are, in fact, in accordance with the contention of the appellant. Stair's Institutes of Scotland, pp. 29, 36, 745, 795 ; Mourlin's Commentaries on the Code Napoleon p. 384 ; Kent's Commentaries on the American Law ; Blackstone's Commentaries Vol. III., p. 94, show that the view taken by Mr. Macqueen of the practice of those countries is erroneous. Stat. 20 & 21 Vict., c. 85, Act IV. of 1869, and the practice of the Parsee Panchayet at the time Act XV. of 1865 was passed, clearly show that the argument deduced from the antecedent improbabilities of the case is baseless. The instances in which courts in England have enforced such decrees as the present are numerous. See Addam's Ecc. Reports and Haggard's Consistory Reports. As to this being an unpopular procedure, it is remarkable that the suit for jactitation of marriage, and the suit for restitution of conjugal rights have alone survived unimpaired. All others, both at common law and in equity, have undergone changes.

The reason why the penal provisions contained in Sec. 36 of the Parsee Marriage and Divorce Act (not found in Stat. 20 & 21 Vic., c. 85, and Act IV. of 1869) were introduced into the former Act arises from the defective character of the old Ecclesiastical Courts in England as explained in Blackstone's Commentaries Vol. III., p. 101. The courts established under Stat. 20 & 21 Vict., c. 85, and Act IV. of 1869, can punish for contempt *proprio vigore*. The Parsee Divorce Court could not. It is *quoad hoc* in the same position as the old Ecclesiastical Courts in England.

The case of *Reg. v. Dossábhái Frámji* simply decided that the Magistrate could not enforce the punishment under Sec. 36, but the *dicta* of the Judges who decided that case are of no authority. They do not appear in any authorized report. The case of *in re Boyce* (i) is in point, for it shows

(i) 2 EL. & B. 521,

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that if the Stat. 9 & 10 Vict., c. 95, had not contained a clause enabling the execution debtor to get his discharge upon payment of the original debt, the imprisonment would have been considered *in pœnam* only, and not in satisfaction of the judgment. That the month's imprisonment was not in the nature of execution upon the judgment is shown by this—that payment, release, or the like would not satisfy it.

The Honourable C. J. *Mayhew* for the respondent, relied chiefly upon the case of *Reg. v. Dossabhái Frámji*, and referred to Sec. 278 of the Code of Civil Procedure as supporting the contention of the respondent.

Atkinson, Serjeant, was heard in reply.

Our. adv. vult.

SARGENT, Acting C.J.—This is an appeal from a decision of the Judge of the Parsee Divorce Court, refusing the application of Ardesar Jahángir Frámji for the arrest and imprisonment of his wife, Avábái, against whom he had obtained a decree for the restitution of conjugal rights.

The application was made under Section 200 of the Civil Procedure Act which, it was said, was incorporated in the Parsee Marriage and Divorce Act of 1865 by Section 40 of that Act. It appeared that the defendant had already been committed to prison, on the 2nd April 1870, for one month, under Section 36 of the Marriage and Divorce Act, which provides that "if a decree for the restitution of conjugal rights shall not be obeyed by the party against whom it is passed, he or she shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to Rs. 200, or with both." Now, Section 40 says that "the provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act," and Section 200, which relates to the enforcement of a decree directing the performance of any particular act, would *primâ facie* be applicable to a decree for restitution of conjugal rights. Again, the three authorities cited to the learned Judge, from whose order this appeal is preferred, and again at the hearing



of this appeal, namely, *Chotum Bebec v. Amcer Chund* (*ubi supra*), (a case apparently between Hindus), *Koobur Khansama v. Jan Khansama* (*ubi supra*) and *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (*ubi supra*) establish that the civil courts of British India, as administering general law and apart from any special Legislative Act, will entertain suits between Hindus and Mussulmans, which are directed to enforce the right of husband and wife to require the cohabitation of the other, and that in such cases the relief proper to be asked and the decree proper to be made, when the husband is complainant, is to declare him entitled to have his wife to cohabit with him, and to order that she do return to his protection. And at p. 609 of the report of the case before the Privy Council, their Lordships, in holding that according to Muhammadan law, a husband has a right to the possession of his wife, and that such right may be enforced by a decree ordering her to return to him and observe her duties, remark as follows: "Whether this (*i.e.* that in the event of disobedience the wife is to be given bodily into her husband's hands) could be done under the new Act of Procedure, which now regulates the civil courts of India, may well be doubted. Disobedience to the order of a court directing the wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment or attachment of property or both." It seems, therefore, that the section of the Civil Procedure Code as to execution of decrees, and particularly Section 200, might, in the judgment of the Privy Council, have been resorted to before the passing of the Act for the enforcement of a decree ordering a wife to return to cohabitation with her husband, or, in other words, of a decree for restitution of conjugal rights.

But, assuming that the provisions of the Civil Procedure Code as to enforcing decrees are, in the absence of any others, applicable to the case of decrees for restitution of conjugal rights, the case may be very different when the Legislature has provided for a particular class and community legislative provisions deemed to be adapted to their peculiar

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wants and sentiments, as the Legislature has in fact done in "The Parsee Marriage and Divorce Act, 1865." In such a case, the question for consideration is whether, having regard to the special provisions of the Act itself, these provisions of the Civil Procedure Code, which are designed to meet the case of the enforcement of decrees generally, can still be deemed applicable to decrees made in exercise of the special jurisdiction created by that Act, or, in other words, whether the imprisonment or fine provided by Sec. 36 of that Act are not intended to be in substitution of, and not in addition to, the ordinary remedies provided by the Code of Civil Procedure. Now, we can entertain no doubt, and indeed it was almost conceded in argument, that if the imprisonment and fine contemplated by Sec. 36 of the Parsee Act were in the nature of process of execution of the decree, they must be deemed to have been substituted for the imprisonment and attachment of property, which are the modes of enforcing decrees provided by the Code of Civil Procedure, or in other words, that the Act itself, having specified a mode of enforcing its decrees, similar in its nature to that provided by the Code of Civil Procedure, and differing principally in degree, the sections which relate to execution of decrees will so far be not applicable. It was, however, contended that the imprisonment and fine were by way of punishment or for contempt, and did not, therefore, by implication deprive the decree-holder of the means provided by the Code of Civil Procedure for enforcing decrees.

Now, as the language of the Act is ambiguous, we shall do well to call to our aid the circumstances which led to the passing of that Act. The preamble of the Act says that its object was to make the law relating to marriage and divorce among Parsees conformable to the customs of the community. At the time the Act was passed, Parsees, as appears from the case of *Ardascer Curschjee v. Perozeboye (j)*, could only have resorted to the High Court, in its ordinary civil jurisdiction, to obtain a decree for restitution of conjugal rights, and such a decree could only have been enforced like

(j) Moo. 357.

all other decrees by the provisions of the Code of Civil Procedure.

In the report made by the Commissioners, appointed to make an inquiry into the usages of the Parsee community, it appears "that the statement relating to marriage and divorce, which was framed by the managing committee of the Parsee Law Association, and upon which the present Act was based, was itself, with one addition, based upon the English Divorce Act of 1858." That Act treats a decree for restitution of conjugal rights like all other decrees and orders. We may conclude, therefore, that there could have been no intention on the part of the framers of the Act to treat disobedience of a decree for restitution of conjugal rights as differing in its character from disobedience of any other decree of the Court. This question, however, is not altogether clear of authority, as it would appear to have been already under the consideration of this Court in the case of *Reg. v. Dosábhái Frámji*, on an application to compel the defendant, a Police Magistrate, to entertain an application for commitment under Sec. 36, and Sir J. Arnould and the present Chief Justice decided that the application should be made to the court which passed the decree for restitution of conjugal rights, and not to the Magistrate under Secs. 46 and 47. Whatever were the grounds on which they base their decision (of which, having regard to the objection of the appellant's counsel, we cannot consider ourselves as having a report of authority), they must, we think, be held to have decided that "an offence under the Act" had not been committed. It was contended, however, by Mr. Serjeant Atkinson that the above considerations did not necessarily touch the question whether the imprisonment and fine were intended as a punishment for contempt of court, as distinguished from a process for enforcing its decree. But if the Legislature had such object in view in punishing disobedience of its decree, we should expect to find a general provision in the Act applicable to all cases of contempt. If, therefore, the Legislature intended that the provisions of the Civil Procedure Code should continue to be appli-

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cable as the appropriate means of enforcing a decree of the Court, we have a difficulty in seeing any ground for the enactment of the latter part of Sec. 36 of that Act. The measure provided by the Act is doubtless not a very stringent one for compelling a woman to return to her husband, but it may well be that the framers of the Act, recognizing the futility of attempting to force a woman to return to her husband, considered that a less severe penalty than is provided by the Code of Civil Procedure in other cases would best accord with the feelings of the Parsee community. On the whole we are of opinion that the Judge was right in refusing to put in force Sec. 200 of the Code of Civil Procedure, and that the rule *nisi* was rightly discharged with costs. The costs of this appeal must be borne by the appellant.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 258 of 1872.

CHINTA'MAN BHA'SKAR.....Appellant.
SHIVRA'M HARI and others.....Respondents.

Mortgage—Possession—Registration—Notice.

A mortgage without possession is not, in Hindu law, absolutely invalid but is binding as between the mortgagor and mortgagee.

A purchaser with possession at a Court's sale, whose certificate of sale is registered, buys the right, title and interest of the debtor, burdened with the lien of a prior mortgagee, without possession, whose deed of mortgage is registered.

THIS was a special appeal from the decision of H. F. Parsons, Assistant Judge of Ratnagiri, reversing the decree of the Subordinate Judge of that town.

The special appeal was heard by SARGENT, Acting C.J., and MELVILL, J.

Máneksháh Jehangirsháh for the special appellant.

Rávsáheb V. N. Mandlik for the special respondents.

The facts sufficiently appear from the following judgment:—

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PER CURIAM:—This is a suit by the special appellant to recover possession from the respondents, the second and third defendants on the record, of half the village of Medeh which, the special appellant says, was mortgaged to him by the first defendant on the 2nd October 1867. The second defendant claims as purchaser at an auction sale of the right and title of the first defendant in the property in question, under a certificate of sale, which was given him by the court on the 27th May 1868, and registered on the 19th August 1868, and under which he obtained possession.

The mortgage deed of the special appellant was not registered before the 8th January 1868.

The Assistant Judge was of opinion that the question between the parties narrowed itself to the following:—Is a purchaser *bond fide* and for value liable for a mortgage of which he had no notice, and the holder of which is not in possession? and he answered this question in the negative.

In framing this issue as the crucial one to decide the rights of the parties, the Assistant Judge has omitted to draw the necessary distinction between a purchaser under an ordinary contract of sale from the owner of the property, and a purchaser at an auction sale in execution of a decree against such owner.

The latter purchases only the right, title, and interest of the judgment-debtor in the property in question, or, in other words, the property subject to all charges with which it may have been previously burdened by him. He acquires nothing by his purchase but what still remains in the judgment-debtor, and the question of notice can have no application to him. The decision of the Court in Special Appeal No. 510 of 1869, *Mathuradas v. Kaliá (a)*, is a sufficient authority, if any were needed. It was contended, however, that the mortgage in the case cited was a *san* mortgage and

(a) 7 Bom. H. C. Rep. A. C. J. 24.

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created a valid charge without possession, but that in the Konkan, where the property in question is situated, a mortgage without possession created no valid incumbrance, and that the entire property was still vested in the judgment-debtor at the time of the attachment. It was said that such was the general Hindu law to which *san* mortgages were an exception. The Hindu Law undoubtedly gives the preference to a subsequent mortgagee, who has obtained possession, over a prior mortgagee, who has neglected to obtain it, but it is nowhere said that a mortgage without possession is not binding on the mortgagor, and we need scarcely say that it is a matter of constant occurrence for suits to be filed by mortgagees to compel delivery of possession by mortgagors ; and so it was virtually ruled in Special Appeal No. 546 of 1869 *Gopal v. Krishnappa* (b). Lastly, it was contended that the decree might be supported on the fact, as found by the Judge, that the special appellant and the judgment-debtor's brother and son were present at the attachment and sale, and yet nothing was said as to the mortgage. Assuming that the special appellant could be deemed bound by the conduct of these persons owing to their being an undivided family, (a fact which is not found), there is no evidence to show that they were under any obligation to speak. They knew that the property was sold subject to the special appellant's interest and it is not alleged that they were questioned by the defendants, so as to have made it unconscientious in them to keep silence.

Moreover, this objection is now taken for the first time. The decree must, therefore, be reversed and the case remanded for the Judge to find as to the genuineness of the mortgage (Exhibit No. 3), and to pass a new decree having regard to the above observations.

Decree reversed and case remanded.

(b) Ibid 60.

[APPEAL FROM INSOLVENT COURT.]

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Sept. 20.KALLIA'NDA'S KIRPA'BA'M*Appellant.*TRIKAMLA'L GULA'BRA'I.....*Respondent.**Insolvent Court—Practice—Appeal—High Court—Notes of evidence not taken—Jurisdiction to hear appeal.*

In order to enable the High Court to hear the appeal of an opposing creditor from an order made upon the hearing of an insolvent's petition which such creditor opposes (and upon which evidence is taken), it is necessary that notes of all the evidence at the hearings should be recorded by an officer of the Insolvent Court.

In re Lakhmidās Hansrāj (a) in substance followed.

THIS was an appeal from an order (dated 5th June 1872) of Gibbs, J., sitting as Commissioner in the Insolvent Court, by which, after hearing counsel on behalf of Kalliándās Kirpárám, a creditor who opposed the discharge of the insolvent, and after the cross examination of the insolvent, and after the examination and cross examination of several witness called on behalf of the opposing creditor, and on reading several exhibits, the learned Judge ordered that the hearing of the matters of the insolvent's petition should be adjourned without protection until the 4th of December then next.

The grounds of opposition filed by the opposing creditor charged the insolvent with offences coming within the 50th Section of the Insolvent Debtor's Act, but the learned Judge did not consider that the circumstances of the case warranted him in punishing the insolvent under the penal section, and he, therefore, made the above order under Section 47 of the Act.

From the above order, the opposing creditor presented a petition of appeal to the High Court. The petition was accepted by GREEN, J., in Chambers in June 1872.

On the first day of the hearing before the Commissioner, no notes of the evidence given were taken or required to be taken, under the provisions of Section 72 of the Insolvent Act; but on the second and subsequent days of the hearing,

(a) 5 Bom. H. C. Rep. O. C. J. 63.

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The appeal came on for hearing before SARGENT, Acting C.J., and BAYLEY, J., on the 24th of August 1872.

Anstey and Leith, for the appellants, were requested in the first instance to apply themselves to the question whether, under the circumstances, an appeal lay to the High Court. The Court referred to *in re Lakhmidās Hansraj* (b).

Anstey—It does not appear who was the appellant in the case referred to. If the insolvent was the appellant (as he would seem to have been), the decision can be supported, for I have always contended that no appeal is by the Act given to an insolvent, see *Gill v. Barron* (c) and *in re Abrahams* (d). How can an insolvent be expected to be in possession of money to make the deposit which is required before notes of the evidence can be taken? The report of the case of *in re Lakhmidās Hansraj* is very unsatisfactory and no reasons for the decision are given.

I. We contend that the taking of notes under Sec. 72 is not a condition precedent to the right of a creditor to appeal under Section 73. The words of the latter section are imperative, the Court “shall hear” the appeal, while under Section 72 it is discretionary with the opposing creditor to require notes to be taken. He may require them to be taken for his own protection. It would be obviously unjust to require a creditor to have notes taken by an officer of the Court from the beginning of the case, when it may not be until near the end of it that he becomes dissatisfied with the manner in which the Court is conducting the inquiry. Besides, any person aggrieved by the order of the Insolvent Court may appeal (i.e.) all the creditors of the insolvent. Must they all have notes taken of the evidence? The provisions of Sec. 72 were introduced in order that the opposing creditor might be enabled to have proper materials upon which to appeal. Here we have the full notes

(b) 5. Bom. H. C. Rep. O. C. J. 63.

(c) 5 Moo. P. C. C. (N. S.) 218.

(d) 2 *Ibid* 241.

taken by the Commissioner himself which he has allowed us to use. If the Court does not allow an appeal, it in fact overrules the express provisions of the Statute. (BAYLEY, J., referred to in *re Gholam Rasul Khan* (e) ; In the matter of *Ramsebak Misser* (f)).

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II. If we cannot appeal on the evidence, we can at least show that upon the facts as they are set forth in the judgment of the Commissioner his decision in point of law is erroneous.

III. The appeal in the case has already been admitted by Mr. Justice Green. The present objection, if a good one, ought then to have been taken. It is now too late : *Gopee Bullub Roy v. Goluck Proshad Bose* (g) followed by Peacock, C.J., in *Bharutt Chunder Roy and others v. Issur Chunder Sircar and others* (h). The case of *In re Ameer Khan* (i) was also referred to.

The insolvent appeared in person.

SARGENT, C.J. :—On the last point made by Mr. Anstey, we are clearly of opinion that the objection that has been raised cannot be got rid of by reason of the petition having been admitted by Mr. Justice Green. There are no provisions in the Insolvent Act as to the presentation of petitions of appeal similar to those contained in Section 336 of the Civil Procedure Code, and the cases referred to by Mr. Anstey, which were decided upon the latter section, are, therefore, inapplicable. On the other point, we will take time to consider our judgment.

Cur. adv. vult.

On the 20th of September the Court delivered judgment and said that, though the taking down of evidence by an officer of the Insolvent Court was not a condition precedent to the right to appeal, yet that, in cases where it was necessary to consider the evidence, the Appellate Court could only look at the notes of evidence taken down by an officer of

(e) 1 Beng. L. Rep. O. C. J. 130. (f) 5 Beng. L. Rep. 179.

(g) Calc. W. Rep. for 1864 Civ. R. 135.

(h) 8 Calc. W. Rep. Civ. R. 141. (i) 6 Beng. L. Rep. 459.

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 KALLIA'N- the Insolvent Act, and when it appeared that no such notes
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 KIRPA'RA'M had been taken, had no option but to dismiss the appeal.
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 TRIKA'MLA'L The appeal was accordingly dismissed.
 GULA'BRA'I.
 Attorneys for the opposing creditor : *Craige, Lynch, and*
Owen.

[APPELLATE CIVIL JURISDICTION.]

Sept. 23.

Referred Case.

VIJGOR, mother of PA'NA'CHAND and
 TA'RA'CHAND minors, sons of HIRA'-
 CHAND deceased *Plaintiffs.*
 JIJIBHA'I VA'JI *Defendant.*

Minor—Act XX. of 1864—Next friend, suit by—Procedure.

There is nothing in the Minors Act (XX. of 1864) to prevent the institution of a suit by the next friend of a minor who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the Principal Civil Court of the District.

As the right, however, of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minor's Act, by Sec. 3—7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his estate, the proper course for a Court, to which a plaint on behalf of a minor is presented by his friend, is either to refuse to accept the plaint, when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint and stay proceedings until the plaintiff has duly obtained a certificate under the Act.

THIS was a reference made by W. H. Newnham, Acting Judge of the District of Súrat, under Section 28 of Act XXIII. of 1861, for the orders of the High Court.

The reference was considered by SARGENT, Acting C.J., and MELVILL, J.

None of the parties appeared either in person or by counsel.

The facts of the case, so far as material, appear from the judgment of the High Court.

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PER CURIAM :—This is a reference under the provisions of Section 28 of Act XXIII. of 1861 by the Acting District Judge of Súrat. It appears from the Judge's statement of the case that a suit had been brought by Pánáchand and Táráchand, heirs of Hiráchand, by their mother Vijkor, to recover from one Jijibháí Vaji the balance of principal and interest due on a note, dated the 15th June 1868 passed to Hiráchand; that the Subordinate Judge rejected the plaint because Vijkor had no certificate as required by Act XX. of 1864 and that she had appealed urging that the order was "contrary to law and justice." The other facts of the case and the grounds on which the Judge has thought it right to refer it for the consideration of this Court are best given in his own words. "Hiráchand died on December 8th 1870; his widow applied for a certificate on February 28th 1871, and after inquiry one was ordered to be given her on June 30th 1871; but in the meantime the period of three years expired, and on the last day she presented her plaint, which was as above rejected. My attention has been repeatedly drawn to the injury entailed on minors by the Limitation Act together with Act XX. of 1864. In this case there was considerable delay in granting the certificate, owing partly to the Court's vacation and partly, I believe, to the delay in appointing an Assistant Judge to replace Mr. Murphy; but a man might die while holding bonds within a week of being time-barred, and as a certificate could not be obtained within that time, and the Limitation Act would not help his minor heir (Section 11), as the disability would have arisen after cause of action accrued, the minor would lose his remedy altogether. It might be urged that this is only the penalty of the laches of the original bond-holder, in not suing before; but this would be, I think, a harsh view of the case.

"It appears to me that the best remedy would be to direct the Subordinate Judges to receive such plaints and endorse them with date of presentation, but not register them

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as suits till the plaintiffs had obtained the necessary certificate, for which time should be allowed; satisfying themselves also that the plaintiffs lost no time in applying to the District Court. (The Subordinate Judge, for example, might briefly report the receipt of each such plaint to the District Court, which in reply would notify to him date of application by the plaintiff.)"

Before discussing what course should have been pursued by the Subordinate Judge, we would remark that Sec. 3 of the Bengal Minor's Act (XL. of 1853), which is the corresponding Section to Section 2 of the Bombay Act XX. of 1864, concludes with the following proviso: "Provided that, when the property is of small value or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative." It is to be regretted, we think, that the words "for any other sufficient reason" have been omitted from the Bombay Act. Had they not been so, the difficulty to which the Acting Judge refers, would have been at once removed by the Subordinate Judge, in the exercise of his discretion, treating the special circumstances as a sufficient reason for allowing the suit to be instituted without a certificate of administration. It is true that Section 3 of the Act authorizes any relative or friend of a minor to apply to the Court for the appointment of a fit person to take charge of the minor's property, but this application has to be made to the Civil Court, a different Court, and it may be far removed from that in which in all probability legal proceedings would have to be instituted on behalf of the minor. Moreover, the procedure to be observed as directed by the 5th and following sections is in itself a complete bar to a summary appointment of an administrator in a case like the present one, where the necessity for filing the plaint is not discovered till the last moment. It is clear, therefore, that if the Act absolutely forbids the institution of a suit on behalf of a minor otherwise than by a person who has obtained a certificate of administration, the interest of the minor may,

under certain circumstances, be seriously prejudiced. Now, it is to be remarked that Section 2 which forbids any person to institute a suit, who has not obtained a certificate, is in words confined to those who "claim a right to have charge of property in trust for a minor," the object clearly being to take precautions against property of minors falling into the hands of those whose fitness has not been previously inquired into and adjudicated on. There is nothing, however, in the Act which we can discover that prevents the institution of a suit by a friend of the minor who claims no right to have charge of the property, and whose plaint asks for a declaration of the minor's rights, and that the defendant be ordered to pay the money he owes to the minor into the Principal Civil Court of the District, which by Section I. is specially entrusted with the charge of the minor's property, and, therefore, by necessary implication invested with the power of disposing of it as the interests of the minor may require. It is true, perhaps, that such a plaint would be an unusual one in point of form in the Mofussil courts. But, as pointed out by this Court in the case reported at page 7 of 7 Bom. H. C. Rep. (where the Court allowed a minor who was residing outside the Presidency to sue by his next friend), such a suit "is in accordance with the ordinary practice of courts in suits brought by infants."

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It may be said perhaps that as the Act provides a course which may be taken by a relative or next friend of a minor who is anxious for the safety of the minor's property, it could not have been intended that he should adopt any other course and that the maxim "*expressio unius est exclusio alterius*" applies.

Such a maxim must, however, yield to the paramount object of the Act which, as declared in the preamble, is "to make better provision for the care of the persons and property of minors," and we think it would be contrary to the spirit of the Act, and defeat the object the Act had in view, were it to be construed as absolutely forbidding the institution of a suit for the benefit of a minor, under any circumstances however pressing, by a next friend not claiming to have charge of the property, but seeking only to protect the minor's interests.

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The right, however, of a next friend to institute a suit has always been considered one more or less under the control of the Court, and, therefore, as the Act enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his interests, it would be a proper course on the part of the Judge to refuse to accept such a plaint where there was no pressing necessity for a departure from the course pointed out by the Act, or it might be to accept the plaint and stay proceedings until the plaintiff had obtained a certificate where it was in contemplation to apply for it. We think, therefore, that the plaint should be accepted, after being amended by inserting the words "as their next friend" after the name of the minor's mother in the title of the suit, and by amending the prayer in accordance with the above remarks; and that as the mother has, since the institution of the suit, obtained a certificate, the plaint should be heard and determined as if it had been filed by her originally in her character of administratrix.

Ordered accordingly.

[APPELLATE CIVIL JURISDICTION.]

Sept. 24.

Special Appeal No. 182 of 1872.

MIE ZULEF ALI *Appellant.*

YESHVADA'BA'I SA'HEB, widow of RA'G-

HOJI ANGRIA *Respondent.*

Sequestration—Ratification—Independent Sovereign's private property—Evidence.

A sequestration by the officers of the British Government of the private property of the Angria of Kolāba—a Native independent Sovereign—though made contrary to the express orders of the Court of Directors originally given, would not be liable to question in a Municipal Court if subsequently ratified, but *aliter* where there is no such ratification.

THIS was a special appeal from the decision of Robert Hill Pinhey, Judge of the District of Pūna, amending

the decree of N. Daniell, Assistant Judge, passed on remand from the High Court.

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BA'I SA'HEB,
widow of
RA GHUJI
ANGRIA.

The plaintiff, widow of Rághoji Angriá, the late ruler of Kolába, sued the defendant Zulef Ali to recover possession of a piece of land held by her late husband as *miras* in the village of Chakan in the Púna District. On remand of the case by the High Court, the Collector was made a party as defendant No. 2.

Zulef Ali *inter alia* pleaded that the resumption of Angria's estate by the British Government, was an act of State and that no Civil Court had jurisdiction to question such an act, that requests made by the plaintiff to the Government praying for restoration of her *Inam* and *Miras* lands were refused and that a Sovereign could not hold private property especially in foreign territory.

The Collector's answer was to the same effect.

The Assistant Judge awarded the claim and the District Judge in appeal substantially confirmed his decision amending it only by varying his order as to costs.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlál Mathurádás (Government pleader) and *Vishnu Ghanashám* for the defendant Zulef Ali :—The Collector did not separately appeal. The District Court has presumed, but without any evidence, that the land in question is the private estate of the Angria who being an independent Sovereign could not hold private property in British territory. Even supposing the land to be private property, the resumption thereof was an act of State. No Civil Court has authority to decide between the differences of independent Sovereigns. This case is on all fours with the case of *The Secretary of State v. Kamachee Boye Sahaba* (a).

Shántárám Náráyan for the respondent contended that this case was to be distinguished from the case quoted by the appellant, inasmuch as the Court of Directors had there rati-

1872. **MIK ZULEF ALI** v. **YESHVADA'-BA'I SA'HEB,** widow of **RAGHOJI** **ANGRIA.** filed the Act of the Madras Government, while in this case the sequestration was not only not originally authorized but was not subsequently ratified. The Court of Directors, when confirming the resumption of the Angria's State in consequence of the absence of a male heir, ordered that his private property should be restored to his representative.

PER CURIAM :—The District Judge has found (and we see no reason to think that his finding is incorrect) that the land in dispute was the private property of Angria.

That finding, however, is not sufficient to entitle the plaintiff to succeed. There still remains the question whether the land has, since Angria's death, been taken possession of by the British Government by an act of State.

We do not think that that question was raised for the consideration of this Court when the case first came before it, nor that we are prevented by the Court's remand order from now considering it.

The case of the *Secretary of State of India in Council v. Kamachee Boye Sahaba (b)* is in many respects similar to that now before us. That was a case in which the property of the Rajah of Tanjore had been seized by the British Government as an escheat, and the suit was brought by his widow to recover his private estate. She obtained a decree in her favour from the Chief Justice of the Supreme Court of Madras, who held that the seizure of the Rajah's private property could not be regarded as an act of State. "It appears" said the Chief Justice "that an order having been issued (by the Court of Directors) to take possession of public property, private property was taken and is now detained under the circumstances above set out. I am of opinion that such detention cannot be considered an act of State, nor can I consider that the subsequent adoption by the defendants can make that an act of State which originally was not so." This decision was reversed by the Judicial Committee of the Privy Council, who held that, even if the property were private property, and even if the original seizure were

not authorized by the order of the Court of Directors, yet the seizure was subsequently approved by the Governor of Madras, and was adopted and ratified by the East India Company in their answer to the suit: that such ratification was equivalent to a previous authority, and that the seizure was an act of State, to enquire into the propriety of which a Municipal Court had no jurisdiction.

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In the present suit, accepting the District Judge's finding that the land was Angria's private property, we must hold that the original sequestration was not authorized by the order of the Court of Directors. But the question remains—whether, as alleged by the appellant, there has been a subsequent ratification of the sequestration.

It cannot be said that the Collector's defence to this suit constitutes a sufficient ratification. To justify an act opposed to the original order of the Court of Directors, there must be shown to have been a ratification either by the Court of Directors or by the Secretary of State in Council.

The appellant refers us to the Collector's examination, Exhibit No. 70, as shewing that an application made by the plaintiff to the Court of Directors for the restoration of Angria's lands was rejected on the 7th June 1848. No copy of that application however, nor of the reply of the Court of Directors, has been given in evidence in the case. The defendant complains that the Assistant Judge refused to assist him to procure copies of these papers, and asks us to remand the case in order that he may have an opportunity to produce them. There appears to be no sufficient reason for granting him this indulgence. In his Darkhást No. 117, the defendant asked the Court to send for the papers either from the Collector or from Government under Section 138 of Act VIII. of 1859. The application was refused on the ground that the defendant ought to produce copies. There is no allegation that he has ever asked for or been refused copies; and Exhibit 76 shows that the Collector has been willing enough to give him copies of other documents which might be of use to him; nor is there any reason to suppose that the plaintiff's petition to the Court of Directors and the

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answer thereto would, if produced, shew any thing more than that the plaintiff had asked for, and been refused the restoration of Angria's *Ináms*, or the privilege of holding *wattan* and other lands free of assessment. That we understand to be the meaning of what the Collector says in his examination, No. 70. The object of the present suit is not to establish the plaintiff's rights as *Inámdár*, but to establish her right as *Mirásdár*, to the occupancy of certain lands subject to the payment of the Government assessment. It is clear from the Government Resolution No. 2807, dated the 10th August 1860 (Exhibit No. 76), and generally from the manner in which the Collector has defended this suit, that the Government do not consider that this right of occupancy has been confiscated. There is not the least reason to suppose that this right was referred to in the plaintiff's application to, and the reply of, the Court of Directors, and indeed as regards the particular land now in dispute, it could not have been referred to; for the application was made in 1847 and it was not until sometime after this that Angria's name was removed, and that of the defendant entered as occupant of the land. On these grounds we are of opinion that even if the plaintiff's application, No. 117, was improperly rejected (we do not say that it was), the evidence asked for could not have varied the decision.

On the whole we think that the decree appealed against is the decree which ought to be made, and we confirm it.

[APPEAL FROM INSOLVENT COURT.]

1872.
Sept. 26.DVA'RKA'DA'S LALUBHA'I and another...*Appellants.*GEORGE BLACKWELL.....*Respondent.*

Practice—Insolvent Debtor's Court—Discharge of Insolvent—Opposing Creditor taken by surprise—Appeal—Reinstatement of Petition on list—Stat. 11 & 12 Vict., c. 21, Secs. 56 and 73.

Where an opposing creditor being, without any default on his part, misled as to the time when an Insolvent's petition was to come on for hearing, failed to appear when the petition was called on and the Insolvent obtained his discharge *ex parte*, the Appellate Court, on the ground that the opposing creditor had been taken by surprise, set aside the order of discharge and restored the case to the board.

Semble that, under the circumstances, the Commissioner sitting in Insolvency had no jurisdiction to set aside the order of discharge.

THIS was an appeal from an order made by Gibbs, J., on the 24th of April 1872, when sitting as Commissioner in Insolvency, declaring the Insolvent entitled to his personal discharge under Sec. 47 of the Indian Insolvent Act (Stat. 11 & 12 Vict., ch. 21).

The Insolvent, George Blackwell, filed his petition and schedule on the 15th of December 1871. Two of his creditors, Dvárkádás Lalubháí and Dayábhái Lalubháí, filed joint grounds of opposition to his discharge, and the petition was therefore placed upon the list of opposed petitions. The principal ground of opposition was that the insolvent was not an inhabitant of, and did not reside in, Bombay, and that therefore the Court had no jurisdiction to hear his petition or grant him his discharge. The case was set down for hearing on the 24th April 1872, when, the opposing creditors being called and not appearing either in person or by Counsel, the Insolvent's discharge was granted.

On the same day, *Atkinson*, Serjeant, appeared for the opposing creditors and applied that the matter of the petition might be reheard under Sec. 56 of the Act and stated that the opposing creditors had been taken by surprise; that the insolvent had made a false statement as to his residence, and that, therefore, the Court had jurisdiction under

1872. Sec. 56 of the Act to recall its order of discharge. The Court, however, considering that Section 56 was not applicable under the circumstances of the case, refused to interfere and dismissed the application.

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Thereupon the opposing creditors filed a petition of appeal from the order declaring the insolvent entitled to his discharge, and prayed that the order might be cancelled or that the Appellate Court might make such further or other order in the premises as to it might seem meet. The affidavit, which was filed with the petition of appeal, averred that the hearing of the insolvent's petition had, after being transferred to the list of opposed petitions, been ultimately fixed for the 24th of April 1872; that the opposing creditors had duly instructed Counsel to oppose the discharge of the insolvent; that on the 19th of April the Commissioner had announced his intention of not sitting on the next Court day (the 24th April) until 12 o'clock noon and that the insolvent's petition was third upon the list for that day. The Commissioner, however, sat at 11 A.M. Shortly after that hour the petition was called on and (the opposing creditors not being present) the insolvent was discharged under Sec. 47 of the Act. The appellants submitted that under these circumstances the order of discharge was a surprise upon them and ought to be cancelled.

The appeal was argued before SARGENT, Acting C.J., and BAYLEY, J., on the 26th of September 1872.

Marriott (with him *Mayhew*, Acting Advocate General) for the appellants:—As the Court below refused to reinstate this case on the board under the provisions of Section 56 of the Insolvent Act, and as, in fact, the circumstances of the case did not bring it within the purview of that section, the only course open to the opposing creditors was to appeal to this Court under Sec. 73 of the Act from the order granting the Insolvent his discharge. As no evidence has been taken in the case, the provisions of Sec. 72 as to having the evidence taken down by an officer of the Court have no ap-

plication. The case of *Ex parte Johnstone (a)* is on all fours with the present case.

Latham for the respondent.

Marriott in reply.

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PER CURIAM :—The order of the 24th of April must be discharged and the petition of the Insolvent restored to the board. Each party will bear his or their own costs of the appeal.

Ordered accordingly.

Attorneys for the appellants : *Shapurji and Thakurdas.*

Attorneys for the respondent : *Thacker and Chalk.*

[ORIGINAL CIVIL JURISDICTION.]

Referred Case.

Oct. 3.

W. NICOL AND COMPANY.....*Plaintiffs.*

J. S. CASTLE.....*Defendant.*

Bill of Lading—"Weight contents and value unknown"—Action against Master—Assignee of Bill of Lading for value—Construction—Act IX. of 1856, Sec. 3.

A bill of lading purporting to be for 50 tons of coals and containing a printed clause "weight, contents and value unknown" and similar words written above the signature of the Master, does not amount to an admission by the Master that he has received 50 tons of coal on board.

Upon the true construction of the Bills of Lading Act (IX. of 1856) Sec. 3 a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the Master of the shipment of 50 tons.

THIS was a case stated for the opinion of the High Court, under the provisions of Sec. 55 of Act IX. of 1850, by N. Spencer, Third Judge of the Bombay Court of Small Causes.

(a) 31 L. J. Bank 63.

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The action was brought to recover Rupees 125 as damages for the non-delivery of five tons of coal part of a consignment of 50 tons alleged to have been shipped on board the Steam Ship "Hutton" of which the defendant was the master.

The following are the facts of the case as stated by the Judge of the Court of Small Causes :—

" There was shipped on board the " Hutton" at the port of Sunderland a quantity of coal and coke on account of Messrs. Smith, Fleming, and Company which was made deliverable by the bill of lading to Messrs W. Nicol and Company at Bombay. The mode adopted at Sunderland of weighing coal intended for shipment, which was followed in the present case, is for the tender in which the coal is loaded to be run on to a weigh bridge; the net weight of the coal is then ascertained by subtracting the weight of the truck; the trucks are then run on to a stage over the ship's hold into which the coal is tipped. The coals in question were stowed in the 'tween deck in a compartment by themselves and screened off from the rest of the cargo by plank partitions. In addition to the plaintiff's coal and coke there was shipped on board the 'Hutton' 1,200 tons of other coal and a general cargo. The loading of the ship was completed in two or three days. No person connected with the ship or on behalf of the master or owners was present when any part of the cargo of coal was weighed. The weight was taken from the agents of those employed by the shippers. During the voyage coal, it is admitted, loses in weight by evaporation and by being broken. The percentage of loss varies according to the quality of the coal. The coal in this case being 'double screened,' the loss, it is said, ought to have been very small. The defendant signed a bill of lading a copy of which is set out at the end of the case. Freight was paid in London on 50 tons.

" Messrs. W. Nicol and Company (the plaintiffs) are consignees for value of the coal. On the arrival of the 'Hutton' in Bombay, Messrs. W. Nicol and Company addressed a

letter to Messrs. Thomas Stewart and Company, the consignees of the ship, stating that they were the consignees of 50 tons coal per S. S. 'Hutton,' and as the owners or agents had the option of delivering over the ship's side or on shore, requested to be informed what arrangements Messrs. Thomas Stewart and Company intended to make about weighing, as they (Messrs. W. Nicol and Company) would only take delivery per ton of twenty cwts. weighed over to them.

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" Thomas Stewart and Company elected to avail themselves of the option given to them by the bill of lading and employed their own agents to land the cargo. The coal put into the lighters alongside the ship was, as averred by the defendant and proved by his witnesses, the whole that was shipped at Sunderland on account of Messrs. Smith, Fleming, and Company, but, as it was not then weighed, there was no evidence to show whether it was, or was not, less than 50 tons. When weighed in the wharf, however, and made over to the plaintiff's muccadam, there were only 45 tons.

" The only evidence given to show that 50 tons had been shipped was the bill of lading and an invoice forwarded by Messrs Smith, Fleming, and Company to Messrs W. Nicol and Company, in which the latter are debited with 50 tons. The invoice, it was stated by one of the witnesses for the plaintiffs, is usually prepared from the bill of lading.

" For the defendant it was contended that there was no evidence of the quantity shipped ; that although in the body of the bill of lading, in written words, the quantity was said to be 50 tons, this statement was qualified by the printed condition ' weight, contents and value unknown,' and again by the written words, ' weight unknown' above the signature, and that the defendant, by so signing, did not admit that 50 tons had been shipped. For the plaintiffs it was argued: (I.)—That the two statements in the bill of lading were inconsistent or repugnant ; that a master could not qualify a positive written statement in a bill of lading that a certain quantity of goods had been shipped by such general words as ' weight unknown,' and that these words, being in a foot note, must

1872. not be taken to be part of the bill; and (II.)—Assuming that
 W. NICOL in an action by the shippers it was open to the defendant to
 AND COM- show that the quantity mentioned in the bill had not been
 PANY shipped, yet in an action by the plaintiffs, consignees for valu-
 J. S. CASTLE, able consideration, under Section 3 of the Indian Bill of Lad-
 ing Act (IX. of 1856), the bill was as against the defendant
 conclusive evidence of the shipment.

“I held: (I.)—That the two statements in the bill of lading were not inconsistent or repugnant; that the printed words ‘weight, contents, and value unknown’ controlled the written statements of weight; that the master, by signing the bill, did not admit that 50 tons had been shipped, and, therefore, there was no evidence as to the quantity put on board; and (II.)—That the bill, as qualified, did not represent that 50 tons had been shipped and that, as the plaintiffs had accepted the bill with the qualification, they were as much bound by it as the shippers.

“I non-suited the plaintiffs subject to the opinion of the Judges of the High Court on the following questions—

“I. Is the bill of lading in this case evidence that 50 tons of coal had been shipped?

“II. Is the bill of lading in the hands of the plaintiffs, consignees for valuable consideration, conclusive evidence as against the defendant of the shipment of 50 tons?”

The bill of lading was in the following form, the written portions of it being printed in italics:—

“SHIPPED in good order and well conditioned by *Messrs. Smith, Fleming & Co.* upon the steam ship ‘*Hutton*’ where-
of *Castle* is Master, for this present voyage and now lying in
the Port of *Sunderland* and bound for *Bombay* (via *Suez*
Canal)—

Fifty tons coals,

One hundred and twenty-one tons, seven hundred weights,
Ramsay’s Patent condensed coke.

GOSMAN & SMITH, 144 Leadenhall Street,
E. C.

Shippers are requested to note particularly the terms and conditions of this Bill of Lading with reference to the validity of their insurance upon their goods.

Shippers are cautioned against shipping goods of a dangerous or damaging nature as by so doing they become responsible for all consequential damage and also render themselves liable to penalties imposed by Statute.

tons
50
121-7

being marked and numbered, as per margin, and to be delivered subject to the exceptions and conditions at foot hereof in the like good order, and well conditioned, at the aforesaid Port of *Bombay* unto *Messrs. W. Nicol & Co.* or Assigns.

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Freight and Primage for

the said Goods to be first paid in London, Ship lost or not lost, at the rate of twenty-five shillings per ton of twenty hundred weights.

IN WITNESS whereof the Master or Purser of the said Ship hath affirmed to Three Bills of Lading, all of this tenor and date; the one of which Bills being accomplished the others to stand void.

Dated in *Newcastle* 13th December 1871.

The following are the Exceptions and conditions above referred to :—
Weight, contents, and value unknown.

The Act of God, the Queen's Enemies, &c. [Then followed the Exceptions for which the master was not to be rendered liable and which are of no importance for this report.]

A written declaration of the contents and Value of Goods must be delivered by the shippers to the Owners, with the Bills of Lading, and an untrue declaration shall release the Captain and Owners of ship from all responsibility.

The ships are to be at liberty to sail with or without pilots, and to tow and assist vessels in all situations, and also to deviate from the Voyage for any purpose or to touch and stay at other ports either in or out of the way.

The Owners are to be at liberty to carry the said Goods to their port of destination by the above or other Steamer or Steamers, Ship or Ships, either belonging to the Owners or to other persons, proceeding either directly or indirectly to such Port, and to tranship, or land and store the Goods either on shore or afloat, and reship and forward the same at the Owners' expense, but at Merchants' risk.

In the event of transit to and from Suez and Alexandria, the Goods will be landed, forwarded, conveyed, or re-shipped at the Owners' expense,

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but at Merchants' risk, and in no case will the Owners be responsible for accident, loss, damage, delay, or detention however caused in the course of such landing, transit or reshipment.

The Owners or their Agents shall have the option of making delivery of the Goods under this Bill of Lading either over the Ship's side, or from Lighters, or a Store Ship, or Custom House, or Warehouse, at Merchants' risk.

Consignees or their Assigns must be ready to take delivery of Goods as soon as the Ship is ready to discharge them, otherwise the Owners, or their Agents, shall be at liberty to land and warehouse or discharge them into a Store Ship at the Merchants' risk and expense, and shall have a lien thereon for such expense.

Weight unknown.

J. S. Castle."

The case came on for argument before SARGENT, Acting C.J., and BAYLEY, J., on the 20th of September 1872.

Anstey and Marriott for the plaintiffs :—The Bills of Lading Act (IX. of 1856), being a remedial statute, must be construed so as to give it the widest possible effect. Its object was to protect Assignees for value of Bills of Lading by preventing Masters of vessels from setting up the defence that, though they have signed for goods received on board, such goods have not been received. The only defence that a Master can now set up is that his signature was obtained by the fraud of the shipper or holder of the Bill of Lading, and without any default on the Master's part, and even that defence is not, we submit, valid against a *bonâ fide* consignee for value. In the present case, no fraud on the part of the shipper has been proved, and the Master was clearly in default in not ascertaining the weight of the coals before signing. It would defeat the whole purpose of the Act to allow the Master to protect himself by such a clause as he has introduced into this bill of lading. A similar clause would be inserted in all bills of lading, and the protection intended by the Act would be at an end. The case is one of first impression, for *Jessel v. Bath* (a) relied upon by the Judge of the Small Cause Court is not in point. The decision there rested upon the custom of the trade

(a) Law Rep. 2 Ex. 267.

that was proved. Here the coals were shipped before the bill of lading was signed, and the Master by inserting such a clause as this in fact questions the fact of such shipment. We also contend that the statement of the weight of the coals and the statement that the weight is unknown, are inconsistent, and that the words "weight unknown" must be rejected: Taylor on Evidence, para. 1033. The cases of *Meyer v. Dresser* (b) and "*The Helene*" (c) were also referred to.

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There was no appearance for the defendant.

Cur. adv. vult.

SARGENT, C.J. :—This matter comes before the Court on a reference from the Third Judge of the Small Cause Court, and arises out of an action brought by the firm of Nicol and Co. to recover from the defendant, as Master of the steam ship "Hutton," damages for non-delivery of five tons of coal, part of a consignment of fifty tons said to have been shipped on board the above vessel.

The facts of the case, as stated by the Judge of the Small Cause Court, are as follows :—(His Lordship here read the case as stated and the questions proposed for the decision of the Court and proceeded) :—By the first of these questions I understand the Judge as asking whether, upon the proper construction of the bill of lading, it amounts to an admission by the Master that fifty tons of coal were shipped on board.

The answer to this question depends upon the effect to be given to the words "weight, contents, and value unknown" contained in the printed conditions at the foot of the bill of lading in qualifying the amount of coal inserted in writing. Now, the rule of evidence, when the instrument consists partly of a printed *formula*, such as a bill of lading, and partly of written words, was laid down by Lord Ellenborough in *Robertson v. French* (d). He says, speaking of policies of assurance : "The only difference between policies of assurance and other instruments in this respect is that the greater

(b) 16 C. B. N. S. 646.

(c) L. Rep. 1 P. C. C. 231

(d) 4 East 136.

1872. part of the printed language of them, being invariable
 W. NICOL and uniform, has acquired from use and practice a known
 AND COM- and definite meaning, and that the words superadded in writ-
 PANY ing (subject indeed always to be governed in point of con-
 v. struction by the language and terms with which they are
 J. S. CASTLE. accompanied) are entitled nevertheless, if there should be
 any reasonable doubt upon the sense and meaning of the
 whole, to have a greater effect attributed to them than to the
 printed words, inasmuch as the written words are the im-
 mediate language and terms selected by the parties them-
 selves for the expression of their meaning, and the printed
 words are a general formula adapted equally to their case
 and that of all other contracting parties upon similar oc-
 casions and subjects."

This rule is commented on by Blackburn, J., in *Gumm v. Tyrie* (e). He says: "Then, with regard to the words that are printed, I quite agree with my brother Crompton; and I do not agree with the proposition that Mr. Lush puts his case upon, that the words so printed are to be treated less as part of the contract than the other words, because they are printed. I think where there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think, when one is to overpower the other and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary and, consequently, the written terms would be more considered by him; and, if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered to be more thought of and, consequently, to have more weight by him."

The question then is whether the two parts of this instrument are irreconcilable, or whether, on the contrary, the bill of lading admits of a reasonable explanation as a whole.

Now, it results from the evidence that coals are, in the usual course of trade, shipped on board vessels at Sunderland in the following manner. The coals are weighed in the trucks at some little distance from the ship and are thrown into the ship's hold by the trucks being run on to a stage projecting over the vessel. The Master, whose place is necessarily on his vessel receiving cargo, may well refuse to guarantee the exact weight of coal shipped; and the whole of the bill of lading may, therefore, be reasonably and fairly read as meaning that fifty tons have been received on board as represented to the Master by the shippers, but that he must not be understood as speaking from his personal knowledge or giving any undertaking that such is the exact amount. In *Jessel v. Bath* (f), on which the Judge of the Small Cause Court relies, the bill of lading stated that a certain quantity of manganese had been shipped on board to be delivered at Swansea, the amount being in written words. At the foot of the bill of lading were the printed words "weight, contents, and value unknown"; and both the Chief Baron and Mr. Baron Martin expressed a clear opinion that the written and printed words were reasonably and fairly reconcilable.

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In the present case there are the additional circumstances which make the meaning even clearer than in the case cited. 1st.—That the words "weight, contents, and value unknown" are distinctly connected, as a qualification, with the written words by the latter being immediately followed by the words "to be delivered subject to the exceptions and conditions at foot hereof;" and 2nd.—That the signature itself is accompanied with the words "weight unknown" in writing.

In *Haddow v. Parry* (g), which was an action upon a policy of insurance upon specie or bullion, a bill of lading was offered in evidence to prove that the goods had been shipped on board Her Majesty's Schooner the "Rook," Captain Lawrence, and which was afterwards captured on her passage home. In the margin of the bill of lading was written "Bill of lading for 12,000 dollars, dated 12th Aug. 1808,"

(f) L. Rep. 2 Ex. 267.

(g) 3 Taunton 303.

1872. **W. NICOL AND COMPANY** v. **J. S. CASTLE.** under which were copied the marks of the several chests and their numbers and contents describing them as containing 2,000 dollars each. The body of the bill of lading expressed to be shipped, in good order, six boxes containing 12,000 dollars, being marked and numbered as in the margin, and it was signed "contents unknown, James Lawrence, Lieutenant." It was held that the words "contents unknown" rendered the bill of lading no declaration of what the chests of dollars contained, and it was, therefore, no evidence. And so here the very form of signature might, by itself, be well deemed sufficient to render the bill of lading no declaration by the master of the amount of coal shipped.

We can entertain no doubt, therefore, that the printed formula and the written words are, in this case, reconcilable, and that the bill of lading as a whole admits of a reasonable explanation. Our answer to the first question should, therefore, in my opinion, be in the negative.

The answer to the second question turns upon the construction to be put on the Indian Bill of Lading Act IX. of 1856. The English Act on the same subject, 18 & 19 Vict., C. 111, of which the Indian Act is a literal copy, has come under the consideration of the English Courts of Law on several occasions, but never, so far as we are aware, except incidentally, on the point on which this case turns, namely, the liability of the Master signing the bill of lading to a consignee for value under Sec. 3 of the Act.

Sec. 1 gives a consignee of the goods or indorsee of the bill of lading (to whom the property is intended to pass) the same rights of suit as if the contract had been with himself; and, therefore, in the present case, as the bill of lading does not amount to an admission by the master that fifty tons of coal were shipped on board, the plaintiff could not, as a simple consignee of the coal, recover, under that section, against the Master, without proving that the fifty tons were actually shipped.

Sec. 3, however, places a consignee of the goods or indorsee, who has given value, in a far better position as regards

the Master or other person signing the bill of lading. It says that in their hands the bill of lading, representing goods to have been shipped on board, shall be conclusive evidence of such shipment as against the Master or other person signing the bill of lading, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not, in fact, been laden on board; and leaves only one ground of defence open to the person, so signing the bill of lading, to plead, namely, that the misrepresentation was caused without his default and wholly by the fraud of the shipper.

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The first important question, then, is—what was the amount of coal which this bill of lading represented as having been shipped? Did it represent to third persons who might deal with the shipper that the exact amount of fifty tons of coal had been shipped? If the written and printed words are reconcilable, as they must be taken to be for the purposes of this argument, we are at a loss to see on what ground it can be contended that the bill of lading, taken as a whole, represents to the public as a fact, on which they may rely, that fifty tons of coal had been shipped. Undoubtedly the bill of lading commences by representing that there have been shipped on board the steam ship “Hutton” fifty tons of coal; but the “representation” referred to in Sec. 3 must, we think, mean the representation made by the whole instrument. This appears from the preamble, which says “whereas it frequently happens that the goods, in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bond fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden.”

Here, however, the bill of lading does not purport to be signed by the Master in respect of fifty tons of coal exactly. The object is to protect the *bond fide* holder without notice, and to make those persons liable who have represented to him through the bill of lading that a certain amount of goods

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have been shipped. Here, however, the bill of lading gives him clear notice that the Master, upon whose signature he is supposed to rely, does not admit that fifty tons were shipped. This conclusion follows irresistibly from the previous decisions as to the effect of the printed condition on the written words. If they are reconcileable and the bill of lading admits of a reasonable and fair explanation, it cannot be said that the bill of lading was signed by the Master in respect of fifty tons of coal. But it was said that the Act prevents the Master from guarding himself against the effect of the written words, or in other words, the object of the Act was to throw on him, as between himself and *bond fide* holders, the obligation of ascertaining the truth of the "written words." But this would be to put a construction on the Act far beyond the object as stated at length in the preamble, and would, in our opinion, require distinct words to that effect—words which are certainly not to be found in this Act.

This view of the Act is adopted by the Chief Baron and Mr. Baron Martin in the parallel case of *Jessel v. Bath*, already cited, although it was not necessary to decide the question, as the action was against a person who had not signed, and who was held by the Court not to be bound by the person signing. They both, however, expressed an opinion that no action could have been brought on the bill of lading, under Sec. 3 of the Act, even against the person signing.

We are of opinion, therefore, that the second question should also be answered in the negative. Costs of reference to be paid by the plaintiff.

Attorneys for the plaintiffs :—*Rimington, Hore and Langley.*

[ORIGINAL CIVIL JURISDICTION.]

1782.
Oct. 3.*Referred Case.*BA'I JADA'V*Plaintiff.*TRIBHUVANDA'S JAGJIVANDA'S and another. *Defendants.*

Trustee—Breach of trust—Liability of passive trustee for breach of trust by his co-trustee—Small Cause Court—Equitable jurisdiction, extent of—Act IX. of 1850, Secs. 25 and 32—Act XXVI. of 1864, Sec. 2.

A trustee, who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee.

The Court of Small Causes has an equitable jurisdiction only in the cases specified in Sec. 33 of Act IX. of 1850, as the provisions of Sec. 2 of Act XXVI. of 1864 do not extend the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree.

THIS was a case stated for the opinion of the High Court by N. Spencer, Third Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864.

"A question raised in this suit was, on the 30th of January last, submitted by me for the opinion of the Judges of the High Court. A copy of the case then stated is annexed for ready reference.

"The suit was instituted to recover the value of a pair of gold wristlets entrusted to the defendants by the plaintiff's late husband for the purpose of being by them converted into money and the proceeds invested at interest with a banker for the use of the plaintiff. I held that the claim was barred by the law of limitation. The Judges of the High Court, however, were of opinion that the defendants were trustees within the second Section of Act XIV. of 1859, and therefore that the plaintiff's claim was not barred. The non-suit was set aside, and the cause remitted to this Court for trial on the merits.

"I have now tried the cause, and the evidence given before me has established the following facts :—The two defendants were relatives of Tápídás Makundás, the plaintiff's deceased

1872. husband ; during his last illness the deceased was removed
 BA'I JADA'V to the house of the first defendant, Tribhuvan Jagjivan ;
 v. a few days before his death, the two defendants, Tribhuvan
 TRIBHUVAN- DA'S JAG- Purshotam, the brother of Govardhan, the second defendant,
 JIVANDA'S. and several others, met in the room in which the deceased
 was lying ; and, at the dictation of the deceased, Tribhuvan
 Purshotam wrote the will or testamentary paper, copy trans-
 lation of which is annexed, marked No. 2. A short time
 before this paper was written, the wristlets, the subject
 matter of this suit, were, in the presence of the parties as-
 sembled, handed by the deceased to the defendant, Tribhu-
 van Jagjivan, for the purpose of being disposed of in
 accordance with the writing, and the paper itself was made
 over to the other defendant, Govardhan Purshotam. It has
 been in his possession ever since and was produced by him
 at the trial.

“ It will be observed that in the first part of paper No. 2,
 the name of the defendant Tribhuvan Jagjivan alone appears ;
 with reference to this, I may mention that it was at the
 suggestion of the plaintiff's father and with the consent of
 the other defendant, Govardhan Purshotam, that the name
 of the latter was added as a co-trustee in the subsequent part
 of the document. No evidence was given as to what was
 done with the wristlets after they were delivered to Tribhu-
 van Jagjivan.

“ The defence set up by the defendants was :—By the
 first defendant, a denial that the wristlets were given to him.
 By the second defendant, a denial that he was present when
 paper No. 2 was written, or that he was aware that the
 wristlets had been given to his co-defendant, but he failed to
 give any satisfactory explanation as to how the paper came
 into his possession. I disbelieved the statements of the de-
 fendants, and the facts set out in the preceding para. are to
 be taken as having been proved.

“ On the evidence I gave a verdict against both the de-
 fendants for the value of the wristlets, Rs. 650, subject to
 the opinion of the High Court on the following questions :—

" 1st Question—Has the defendant, Govardhan Purshotam, by his conduct, rendered himself liable, with the other defendant, as a trustee, to make good to the plaintiff the value of the trust property ?

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" 2nd Question—As the defendants have been held to be trustees, can they be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof ?

" By the 25th Section of Act IX. of 1850, constituting this Court, ' every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand in the Court of Small Causes ' ; but it appears to me to be doubtful whether this Court possesses an equitable jurisdiction for plaintiffs, except in the two instances (partnership account and a legacy) in which such jurisdiction is expressly given to it by the 32nd section of the Act.

" 3rd Question—If the defendants are liable to make good the value of the trust property, are they not also liable for the interest which, but for their breach of trust, the plaintiff would have received since 1859, and has not the plaintiff, by suing for the value of the property only, divided her cause of action the whole of which would exceed the money jurisdiction of the Court ?

" I may add that this last defence was not taken by the defendants, but when the objection was pointed out by me at the close of the case, the plaintiff's pleader applied to me to amend the summons, by adding (on payment of the Court fees) Rs. 350 to the particulars of demand for interest, thus making the claim Rs. 1,000, and abandoning the excess of interest, but I did not think it was then competent for me to do so.

" I now solicit the opinion of their Lordships on the three questions above stated."

The case was argued, on the 30th of August 1872, before SARGENT, Acting C.J., and GREEN, J.

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The defendant, Tribhuvan, did not appear.

Tyabji (*Mayhew* with him) for the defendant, Govardhandás :—As to the first point, the defendant, Govardhandás, is not, under the will, a trustee in respect of the subject matter of this suit, and even if he is, there is nothing to show that he has been guilty of a breach of trust or of any misconduct.

As to the second point, this being a suit between *cestui que trust* and trustee, the Small Cause Court has no jurisdiction to try the suit. The only jurisdiction the Small Cause Courts have is conferred by Secs. 25 and 32 of Act IX. of 1850. The words in Sec. 25 "and every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand" show that their jurisdiction is confined to legal demands, for these words would have been unnecessary, if they had equitable jurisdiction. Sec. 32 confers a limited equitable jurisdiction on the Small Cause Courts: *Expressio unius est exclusio alterius*. The Small Cause Courts, for more than twenty years, have refused to try equity cases and they have no legal machinery for carrying out complicated equity decrees.

Inverarity, for the plaintiff :—On a true construction of the will Govardhandás is a trustee, and he has been found to be so by the Judge of the Small Cause Court. The question is whether he has, by his conduct, made himself liable for not carrying out the trusts of the will. The most favourable view the Court can take of his conduct is that he stood by and did nothing to see that the trusts were carried out. If so, he is liable. The law knows not a passive trustee: *Lewin on Trusts*, p. 170. Trustees may not delegate their office to any one, not even to a co-trustee: *Lewin on Trusts*, p. 205, and cases there cited.

As to the second question, the terms of Sec. 25, which should be read with Sec. 37 of Act IX. of 1850, are wide enough to give equitable jurisdiction to the Small Cause Courts. The words are "all suits where the debt or damage, claimed or value of the property in dispute, &c." This is a suit where the value of the property in dispute is not more than the

amount up to which the Small Cause Courts have jurisdiction. 1872.
 The words "every defence which would be deemed good in BA'I JADA'V
 the Supreme Court sitting as a Court of Equity shall be a TRIBHUVAN-
 good bar to any legal demand," only mean that points of DAS JAG-
 equity may be determined by the Court, if they arise in a JIVANDA'S.
 legal action, and this is quite consistent with the Court hav-
 ing the power to try pure equity cases. By the provisions of
 Sec. 2 of Act XXVI. of 1864 the jurisdiction of the Court
 extends "to the recovery of any debt, damage, or demand,"
 &c. ; it is not restricted to a legal demand, but expressly
 provides for any demand. The word "demand" is one of
 the widest signification in our law.

SARGENT, J. :—What are the words in the English County
 Court Act, 9 & 10 Vict., c. 95 ?

The words there are "all pleas of personal actions where
 the debt or damage claimed," &c. (Sec. 58.) The English
 County Courts have a limited equitable jurisdiction under 28
 & 29 Vict., c. 99 ; but it must not be forgotten that they sit
 in a country where there are distinct courts for law and
 equity. When Act XXVI. of 1864 was passed, that distinc-
 tion no longer existed here, law and equity being adminis-
 tered in the same court.

Tyabji in reply.

Cur. adv. vult.

On the 3rd October 1872, the judgment of the court
 was delivered by GREEN, J. :—In the present case three
 questions have been reserved for the opinion of this Court
 by the Third Judge of the Bombay Court of Small Causes.
 From the statement submitted by that Judge, it appears to
 have been held by him that the defendant, Govardhan Pur-
 shotam, had been constituted a trustee, jointly with the
 defendant Tribuvandás Jagjivandás, of certain ornaments,
 namely, the two gold wristlets mentioned in the amended
 particulars of demand. Though it is not one of the questions
 referred to us, we may state that, in our opinion, the Judge
 was right in so holding. No doubt, in the earlier part of the
 document, bearing date the 14th August 1859, the name of

1872. the defendant Tribuvandás Juggjivandás alone is mentioned
 BAI JADA'V as a trustee, but, in the latter part of it, that of the defen-
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 DA'S JAG-
 JIVANDA'S. dant Govardhandás Purshotamdás is added, and the Judge
 finds, as a matter of fact, that this was done by consent of
 Govardhandás himself. He also finds that the document
 was, on its execution, made over to the defendant Govar-
 dhandás Purshotamdás (as indeed appears from the docu-
 ment itself), and has been in his custody ever since and was
 produced by him on the trial. The first question, which the
 Judge has reserved for our opinion, is as to the liability of
 the defendant Govardhandás, with the defendant Tribuvan-
 dás, to make good to the plaintiff, Bái Jadáv, the value of
 the trust property. The trusts, on which, according to the
 document of the 14th August 1859, the gold wristlets in
 question were held by the defendants (so far as concerns the
 plaintiff and so far as it is necessary to mention them for
 the present purpose), were, after the death of Tápidás
 Makundás (the deceased husband of the plaintiff and
 the party executing the document and which death
 occurred shortly afterwards), to sell the same and de-
 posit the proceeds at interest and pay such interest to
 Bái Jadáv during her life. The defendants do not allege
 that the wristlets or the proceeds of their sale have been lost
 under circumstances that would exonerate them from
 liability; on the contrary, the defendant Tribhuvandás, at
 the trial, denied that the ornaments were ever delivered to
 him, and the defendant Govardhandás denied that he was
 present when the document of the 14th August 1859 was
 written or that he was aware that the ornaments had been
 given to his co-defendant. These denials, however, have
 been disbelieved by the Judge who heard the suit, and the
 case stands thus that the defendant Tribhuvandás, having
 received into his hands the ornaments in question, does not
 appear since 1859 ever to have done anything towards carry-
 ing into execution the trusts reposed in him in respect of
 them, and his co-trustee, Govardhandás, so far as appears,
 has stood by, and in no way interfered to see that such
 trusts were carried into execution. This being so, we are of
 opinion, whatever the ultimate liability of the defendant

Tribhuvandás to his co-defendant may be, that the proximate liability of the latter, so far as regards the plaintiff, is the same as that of the former. Whether, however, the liability of the defendants or either of them is to make good to the plaintiff the value of the trust property, is another matter as to which we shall have more to say hereafter.

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The second question, namely, whether the defendants, as trustees, can be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof, raises an important question as to the extent of the jurisdiction of the Courts constituted under Act IX. of 1850 amended by Act XXVI. of 1864—the question, namely, whether those Courts have general jurisdiction over trusts. By Sec. 25 of Act IX. of 1850, the jurisdiction given to the Small Causes Courts is over “all suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500 whether on balance of account or otherwise.” The same section provides “that every defence which would be deemed good in the Supreme Court, sitting as a Court of Equity, shall be a good bar to any legal demand in the Court of Small Causes,” and excludes certain specified classes of suits from the cognisance of the Court. A subsequent section (Sec. 32) extends the jurisdiction of the Court “to the recovery of any demand not exceeding the sum of Rs. 500 which is the whole or part of the unliquidated balance of a partnership account or the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will.” At the time that Act IX. of 1850 was passed, the distinction between Law and Equity, as being two systems of rules having each peculiar and appropriate forms and procedure for the enforcement of the rights given by those rules respectively, existed in the Supreme Courts of the Presidency Towns. The words “debt and damage” in Sec. 25, and in fact the language of Act IX. of 1850 generally, seem to us to indicate, that the legislature intended to give general jurisdiction to the Small Cause Courts only over matters which would have been the subject of a plea *side action* in the Supreme

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Court. Had it been intended to limit the jurisdiction merely by pecuniary amount and not also by class and nature of rights and violations or withholding of rights, there would seem to be no reason for Sec. 32 expressly giving the Court jurisdiction over partnership accounts, shares under an intestacy, or legacies under a will. The provision in Sec. 25, authorizing equitable defences to legal demands, was, in our opinion, introduced with the object of rendering unnecessary an application on the Equity Side of the Supreme Court for an injunction against a proceeding in the Small Causes Court to enforce a legal demand to which, in a Court of Equity, there would have been a defence. This provision and Sec. 32 are, in our opinion, a strong argument against the supposition that the Small Causes Courts under Act IX. of 1850 were intended to have any general equitable jurisdiction, and we believe that it has been always considered that under that Act those Courts had no such jurisdiction except so far as it is expressly given by Sec. 32. Then came Act XXVI. of 1864 of which the preamble is as follows :—"Whereas it is expedient to increase the limit of the jurisdiction of the Courts of Small Causes held under Act IX. of 1850 and to increase the number of Judges of the said Courts ;" and by Sec. 2 it is provided that "the jurisdiction of Courts held under Act. IX. of 1850 shall extend to the recovery of *any debt, damage or demand* exceeding the sum of Rs. 500 but not exceeding the sum of Rs. 1,000 and to *all actions in respect thereof* (except the several actions specified in the proviso in Section 25 of the same Act)." The language of this Section is no doubt more comprehensive than that of Sec. 25 of Act IX. of 1850, and might, taken by itself, be held to give jurisdiction in all classes of suits where the appropriate remedy would be a money decree and where the amount sought to be recovered did not exceed Rs. 1,000, without regard to the consideration whether the right, sought to be enforced, would have been the subject of an action on the plea side or of a bill in equity on the Equity Side of the Supreme Court. It may, further, be mentioned that at the time Act XXVI. of 1864 was passed, the distinction between Law and Equity, as involving

different systems of judicial procedure, had ceased to exist in Bombay on the abolition of the Supreme Court and the establishment of the High Court. But we think that the greater generality of the language of the Section quoted, as compared with that of Sec. 25 of Act IX. of 1850, may be accounted for by this that the Legislature was increasing the limit of the jurisdiction of the Court in such classes of suits as it had jurisdiction in before, and had to employ words which would effect this in respect, not only of the suits of a legal nature which the Court had been empowered to entertain under Sec. 25 of the Act of 1850, but also of the suits of an equitable nature which the Court had been empowered to entertain under Sec. 32 of the same Act. The object of the Legislature, in passing Act XXVI. of 1864, was, we consider, to increase the money limit of the jurisdiction of the Court, not to enlarge the class of suit over which it had jurisdiction; and the language of that Act, taken in conjunction with its preamble, does not necessarily import more than this. Besides, to hold that the later Act (subject, of course, to limit in respect of amount) gives a general equitable jurisdiction to the Court (which perhaps, at first sight, Sec. 2 might, as we have said, seem to import), would involve the unreasonable supposition that the Legislature intended to give such jurisdiction between the money limits of Rs. 500 and Rs. 1,000, but to refrain from doing so, where amounts less than Rs. 500 were involved; and we cannot find in either Act or in the Acts, taken together, any provision or provisions the effect of which would be to give such jurisdiction in the case of such last named amounts. The present case, however, is an example, we consider, of a class of cases where it would be very desirable that the Courts of Small Causes should have jurisdiction, namely, whenever an appropriate remedy can be afforded by a decree for a definite sum of money. But under the present Acts, we are of opinion that the Small Causes Courts cannot enforce trusts, unless the trust, sought to be enforced, is one for the payment of a distributive share under an intestacy or a legacy under a will, the value of the claim being not greater than Rs. 1,000; and we must, therefore, answer the second ques-

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tion in the negative. We may, however, observe that the same answer would have been given to this question, had it been put with regard to a suit in the High Court. The proper decree to be made, in the circumstances stated in the case, would be to appoint a new trustee or trustees of the document of the 14th August 1859 in the place of the defendants, that the defendants do deliver to such new trustee or trustees the ornaments, or their value, and that the defendants do pay to the plaintiff the loss of interest sustained by her by reason of the defendant's breach of trust. Under the declaration of trust of the 14th August 1859, the plaintiff is not entitled to have the ornaments or their value delivered or paid to her individually; but only to the interest of the proceeds of the sale of them for her life. She has, however, a right to require that the capital fund, out of which such interest is to come, be placed in a proper state of security and properly invested.

We do not consider it necessary, having regard to the opinion we have expressed on the two first questions, to express any on the third question reserved, except that, in our opinion, the defendants are liable to make good the value of the trust property in the sense above mentioned, but *not to the plaintiff*; but that they are liable, in a Court having jurisdiction over trusts, to make good *to the plaintiff* the loss of interest she has sustained.

Though the verdict, passed against the defendants, cannot stand, having regard to the opinion expressed above on the questions reserved, yet we should strongly recommend the defendants to satisfy the plaintiff's demands without further litigation. So far as we can at present judge, upon a suit being instituted against them in the High Court, there would be a decree to restore the ornaments or their value and to pay to the plaintiff the amount of interest which, had the defendants fulfilled their trust, she ought to have received, and, on such a decree, they would certainly have to pay the costs of the suit.

As to the costs of the parties of reserving and stating the said questions for the opinion of this Court and of the argu-

ment thereof, we order that the parties do respectively bear their own costs.

Attorneys for the plaintiff :—*Dallas and Lynch.*

Attorney for the defendant Govardhandás :—*C. Tyabji.*

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[APPELLATE CRIMINAL JURISDICTION.]

REG. v. NA'RA'YAN GANGA'RA'M and other.

July 11.

*Offences against opium laws—Regulation XXI. of 1827—Jurisdiction—
Power of arrest.*

The District Magistrate (whose Court is the proper tribunal for the trial of an offence relating to the smuggling of opium *) has, under Section 21 of the Code of Criminal Procedure, power to inflict any fine provided by Regulation XXI. of 1827 for such offence, even though the fine may exceed Rs. 1,000.

The arrest of a person accused of the above offence without a warrant is generally illegal, except under the circumstances specified in Sec. 108 of the Code of Criminal Procedure.

THIS was a reference made by R. H. Pinhey, Session Judge of Púna, for the orders of the High Court.

Each of the two accused was found in illegal possession of a bundle of opium, weighing over a quarter of a Súrat *seer*. The quantity in each of the bundles was such that the penalty recoverable exceeded the sum of one thousand rupees. The Police apprehended the accused without a warrant and sent them on to Mr. Bell, Acting Magistrate of the District of Púna, who committed the case for trial by the Court of Session. That Court, under Sec. 22 of the Code of Criminal Procedure, Cl. 3, delegated the trial to the Assistant Judge, Mr. Satyendra Náth Tagore, who, finding the accused guilty, sentenced each to pay a fine of Rs. 1,292-6-4 or in default to suffer six months' simple imprisonment. Mr. Pinhey, the Sessions Judge, being of opinion that the offence was not triable by the Assistant Judge, and feeling doubtful whether the Magistrate of the District, whose pecuniary jurisdiction was limited, by Sec. 22 of the Code of Criminal Procedure,

* See. *Reg. v. Lakhu Sakru* 8 Bom. H. C. Rep. Cr. Ca. 118.

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to one thousand rupees, could take cognizance of the case, referred the matter for the orders of the High Court. Mr. Pinhey also brought to the notice of the court an illegality in the original arrest of the accused and in the sentence passed upon them by Mr. Tagore.

The reference was heard by LLOYD and KEMBALL JJ.

PER CURIAM :—The court concurs with the opinion of the Session Judge that his Assistant had no jurisdiction, and directs that the accused be tried by the Magistrate of the District, who, the court is of opinion, has, under Section 21 of the Code of Criminal Procedure, power to inflict any fine which he may be competent to impose under Regulation XXI. of 1827, this being an offence punishable under a special law. The Court also concurs with the Session Judge in thinking that an arrest without a warrant for such an offence is generally illegal, though under the provision of Sec. 108 of the Code of Criminal Procedure it is competent to a Police officer, under the circumstances therein named, to arrest without a warrant.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Aug. 22.

REG. v. GARBAD BECHAR.

*Evidence—Confession—Retracting Confession—Crim. Proc. Code
Section 205.*

A detailed confession made by an accused before a Magistrate, but retracted on the examination being read over to him in conformity with Sec. 205 of the Code of Criminal Procedure, does not amount to a confession, although the plea for retracting the confession, viz., ill-treatment of the accused by the police, may be inquired into and found to be untrue.

THE accused was tried and convicted of murder by W. H. Newnham, Session Judge of Súrat, and sentenced to transportation for life.

From the evidence of Máhákor—a pardoned accomplice—it appeared that she had been carrying on a criminal intrigue with Garbad, the convict, that her husband Mansing,

coming to know of this, refused to let Garbad have a share in a piece of land, that Garbad, at the instigation of, or in conjunction with, two other persons, Umed and Girdhar, gave some arsenic to Máhákor to be administered to her husband. Máhákor mixed the arsenic in the food of her husband who died in consequence. Garbad made a full disclosure of the circumstances connected with this matter before the committing Magistrate, but when his examination was read over to him, and he was asked whether what he had stated was true, he retracted and said that he had been beaten by the Police. The Magistrate found this allegation to be false, and the Session Judge, concurring with him on this point, convicted the accused upon the approver Máhákor's evidence, corroborated by the confession so made.

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The appeal was heard by LLOYD and KEMBALL, JJ.

Shántarám Náráyan, for the appellant, contended that a confession retracted before the certificate required by Sec. 205 of the Code of Criminal Procedure was recorded was not admissible in evidence; that this was not a technical objection, and had not been regarded as such by the High Courts at Bombay and Calcutta, and that, the approver's evidence being thus uncorroborated, there was no legal evidence upon which to found a conviction.

Dhirajlál Muthurádas, Government Pleader, appeared for the Crown.

PER CURIAM:—In this case the accused made a detailed confession before the committing Magistrate, but on his examination being read over to him in conformity with Sec. 205 of the Criminal Procedure Code, he retracted and stated: "I said this because they beat me at Jamri." So that in fact there is no admissible confession on the record, and as there is nothing to corroborate the evidence of the approver on any material part of the case, the Court is unable to rely on the evidence of the approver alone. We must, therefore, reverse the conviction and sentence, and direct the accused to be discharged.

Conviction and Sentence reversed.

1872.
Aug. 28.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* NA'RA'YAN BA'BA'JI and others.

*Arrest—Police—Illegal arrest—Intention—Malice—Ind. Pen.
Code, Sec. 220.*

Proof of an unlawful commitment to confinement, will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of Sec. 220 of the Indian Penal Code.

THIS was a reference from R. H. Pinhey, Session Judge of Púna, under Sec. 434 of the Code of Criminal Procedure.

The facts and circumstances of the case were as follows :—

Early in the month of October 1871, a member of the Púna Police Force received an anonymous petition addressed to the " Chief Constable, Púna." It stated that some time previously a robbery had been committed in the house of one Moropant Jog ; that one Náráyan Bidkar had some of the stolen property in his possession ; that he was in the habit of taking his meals at the messhouse of one Athcevale ; that he would be visible there any day at 11 o'clock in the morning ; and that, if cautiously arrested, he would be found with a part of the stolen property about him. This petition being shown by one Akbar Ali, Chief Constable, to Trenn, an Inspector of Police, the latter ordered accused Nos. 1 and 2, Náráyan Bábbjee and Gyanu Ramjee, head constables, to institute inquiries as to the whereabouts of the man Bidkar mentioned in the anonymous petition. They reported among other things that his correct address could not be obtained from him. Inspector Trenn, on the morning of the 12th October, gave a verbal order to Akbar Ali, in the presence of the two accused and other policemen, to arrest Bidkar. The accused Nos. 1 and 2 in consequence arrested Bidkar, and placed him in the Farashkhana, where he remained in confinement for 23 or 24 hours. While in the Farashkhana the accused No. 3, Nánekhan, who was not shown to have had

any knowledge of or connection with the previous arrest, took Bidkar to a separate room and questioned him as to whether he was concerned in the robbery at the house of Jog. Bidkar also alleged that he had been ill-treated, but this he was not able to substantiate. He was subsequently released on his own recognizance by Inspector Trenn.

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Under these circumstances a charge was laid before Dr. Frazer, Magistrate F. P., against the three policemen and another of "confinement by a person having authority who knows he is acting contrary to law" and "wrongful confinement for the purpose of extorting confession," under Secs. 220 and 348 of the Indian Penal Code.

The Magistrate discharged the accused under Sec. 225 of the Criminal Procedure Code. An application was then made to the Session Judge, Mr. Pinhey, under Sec. 435 of the Code, and he, on the 17th of January 1872, directed the three accused to be committed for trial. The trial took place before Mr. Murphy, the Assistant Session Judge, and the accused were acquitted.

An application was again made to Mr. Pinhey, who referred the case for the orders of the High Court.

The reference was argued before LLOYD and KEMBALL, JJ.

Leith and *Shántarām Nārāyan* appeared in support of the reference.

Anstey and *F. S. Hore* appeared for the accused.

Leith :—The question is whether the Police were justified upon receipt of an anonymous petition in arresting the complainant. There was no suspicion whatever in the minds of the Police except what had been raised by the anonymous petition. This petition could not raise a reasonable suspicion within the meaning of Sec. 100, Cl. 2, of the Criminal Procedure Code. A reasonable suspicion must, as laid down by Markby, J., in the *Queen v. Behary Sing (a)*, be at least founded on some definite act tending to throw suspicion on the person arrested and not on mere vague surmise

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or information. Mr. Trenn, the Inspector, would not have been justified therefore in himself making an arrest upon this petition ; much less was he justified in deputing another to make it. If it be assumed that Mr. Trenn was so justified he has not adopted the proper procedure. Sec. 140 requires that when an officer in charge of a Police Station requires any officer subordinate to him to make an arrest without a warrant, he shall deliver an order *in writing*. No written order has been delivered in this case. Were then the accused Nos. 1 and 2, who arrested Bidkar, justified in acting on the verbal illegal order of Mr. Trenn ? I submit they were not. They knew that the inquiry as to the whereabouts of Bidkar was made upon an anonymous petition, they were present when that inquiry was ordered ; it was they who made that inquiry ; and it was upon the information which they themselves had supplied that Mr. Trenn made his verbal order for arrest. We have proved an illegal act on their part, and although we do not allege express malice, legal malice may be presumed. So also knowledge that they were acting contrary to law may be presumed too. Every man is bound to know the law ; much more a policeman who deprives another of his liberty. Section 220 of the Indian Penal Code, which provides that if a person in office commits any person to confinement, *knowing that in so doing he is acting contrary to law*, he shall be punished, makes no exception to this general rule. Here is a case of distinct violation of the law on part of the accused Nos. 1 and 2, and knowledge that they were acting contrary to law must be presumed against them.

Shántarām Nārāyan :—The Legislature could not have intended in Sec. 220 to exempt the Police from the obligation of knowing the law of the land ; for it would be simply impossible in many cases to prove such knowledge. It cannot be denied that the Police had reasonable means of procuring this knowledge and that the illegality was brought to their notice. The Police could have proceeded to arrest only under Secs. 100, 101 or 140. If it be once conceded that Mr. Trenn's order was verbal, the case is taken out of

the protecting influence of those sections. It may then be said that the accused were bound under the provisions of the Police Acts to obey the orders of their superior; but the express provisions of the Code of Criminal Procedure are not superseded by the general provisions of the Police Acts. Section 100 requires that a reasonable suspicion must exist in the mind of the policeman before he makes an arrest. The anonymous petition may have created a suspicion in the mind of Mr. Trenn; it could not have created in his mind a reasonable suspicion. It could not therefore have with any possibility raised a reasonable suspicion in the minds of the accused.

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Anstey, contra :—The Police may well act upon suspicion. Under Sec. 108 of the Procedure Code they can detain a suspected person if he refuses to give his correct address. I submit even the action of Mr. Trenn was quite legal. He receives an anonymous petition in which a charge is made against a person of being concerned in a robbery. He inquires about his whereabouts. The person is unable to give his address. Mr. Trenn, therefore, suspects him and issues an order for his arrest. Mr. Murphy has correctly held that in Sec. 220 the Legislature has waived, in favor of the Police, the general obligation that every one is presumed to know law. If there is any fault it is the Legislature that is to be impeached for making the exception. Under certain circumstances a common rumour will be sufficient to justify an arrest: *Nicolson v. Hardwick* (b); *Perryman v. Lister* (c); *Hillyar on Torts* p. 237. The Police may be liable to an action for damages but they are not criminally responsible: Indian Penal Code Sec. 81. Section 21 of Bombay Act VII of 1867, the provisions of which and of the Code of Criminal Procedure are cumulative, protects the accused.

Leith, in reply :—Section 108 does not apply. The Police must show before they proceed to act under that Section that the offence for which they were arresting was one for the alleged commission of which they could not arrest without a

(b) 5 Car. & P. 495.

(c) L. Rep, 3 Ex. 197; 4 Eng. & I. Ho. Lo. Ca. 521.

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warrant. No other offence was suggested to the minds of the Police than that mentioned in the anonymous petition, and this does not allude to such an offence. Neither the English cases nor Sec. 81 of the Penal Code nor again Sec. 21 of the Bombay District Police Act has any application. The present case is analogous to that of a soldier who fires upon a mob in obedience to the commands of his superior officer but contrary to the provisions of the law. Here is an overt act committed by the Police and intention must be presumed on their part: Broom's Legal Maxims, p. 303.

PER CURIAM :—The proceedings in this case have been referred by the Session Judge of Puna for the orders of the High Court under Section 434 of the Code of Criminal Procedure.

1. Naráyen Bábájee, Head Constable of the 4th class,
2. Gyánu bin Rámjee, Head Constable 2nd class,
3. Nanekhán, Chief Constable, all belonging to the Puna Police Force, were charged before Dr. Fraser, Magistrate F. P., under Sections 220 and 348, Indian Penal Code, with maliciously committing the complainant, Naráyen Nágesh Bidkar, to confinement, knowing that in so doing they were acting contrary to law; and with wrongfully confining the said complainant for the purpose of extorting from him confession or information which might lead to the detection of an offence.

The whole of the circumstances of the case are fully set forth in the proceedings of the Courts below, and it is unnecessary to recapitulate them here further than to state that the Magistrate, finding there were not sufficient grounds for committing the accused to take their trial before the Court of Session, discharged them under Sec. 225, C. P. C., whereupon the complainant petitioned the Court of Session under Section 435, C. P. C., and the Session Judge, Mr. Pinhey, directed the Magistrate to commit the accused for trial under the heads of charge above referred to on the ground that Bidkar was arrested by the accused Nos. 1 and 2, and committed to custody in the Faraskhana on the anonymous

petition above described alone, and " I have no hesitation in saying as at present advised (proceeds Mr. Pinhey) that this act or these acts of the accused Nos. 1 and 2 were wholly illegal and improper, as the anonymous petition was not a reasonable complaint " and did not disclose " a reasonable suspicion against Bidkar within the meaning of Section 100, C. P. C. ;" and with respect to accused No. 3 Mr. Pinhey continues : " He is the superior officer of accused Nos. 1 and 2, and therefore unless, and until, he shows that he was ignorant of the circumstances under which Bidkar was arrested, he is responsible for the illegal confinement of Bidkar from the time that he saw Bidkar in the Faraskhana and took him into the separate room to be questioned. Immediately he discovered that Bidkar had been illegally arrested and placed in wrongful confinement by the accused Nos. 1 and 2, he was bound to release him. Instead of doing this he suffered Bidkar to remain (as Bidkar says starving) for 23 or 24 hours until he was released by the Inspector Mr. Trenn."

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In accordance with the Session Judge's direction the accused were committed to the Court of Session, and the trial, which took place before Mr. Murphy, Acting Assistant Session Judge of Poona, resulted in the acquittal of the accused.

Mr. Murphy found the ill-treatment complained of not proved. With reference to accused Nos. 1 and 2, he remarks : " Before I can convict Náráyen and Gyánu, I must be satisfied that they knew that in arresting complainant and subsequently confining him, they were acting contrary to law ; or, in other words, that they knew no reasonable suspicion existed against him," and then he goes on to the effect that this fact is not, to his satisfaction, established ; and with regard to accused No. 3, he says : " It does not appear that accused Nanekháñ had any thing to do with the arrest, and I do not consider that his knowledge of an arrest and confinement which had been ordered, there is no doubt, by an authority at the least equal to his own, renders him liable under the first (second ?) head of the charge."

1872. Still dissatisfied, the complainant made the application
 REG. to the Session Judge under Section 434 C. P. C., in conse-
 NA'RA'YAN quence of which the proceedings now come before the High
 BA'BA'JI. Court.

In handing them up, Mr. Pinhey observes: "I am of opinion that the Assistant Session Judge's finding is wrong in law. The facts proved at the trial are as stated by me in my judgment in the case on the 17th January last."

It must be observed, however, that in remarking—"the facts proved at the trial are as stated by me in my judgment in the case on the 17th January"—Mr. Pinhey has overlooked the very important circumstance that whereas he (Mr. Pinhey) was at that time of opinion that the accused had acted "on the anonymous petition alone," Mr. Murphy at the trial found "the grounds then which the accused Náráyen and Gyanu had to go upon were—

1. The anonymous petition.
2. The imperfect information given by complainant as to his place of residence.
3. An order from the Chief Constable, or from Mr. Trenn through him, to arrest the complainant and bring him up."

In his minute of the 17th January, Mr. Pinhey laid particular stress on the absence of an atom of evidence that the accused received any order for the arrest of Bidkar, and, therefore, the difference between what he had supposed the facts of the case to be, and the real facts as established by evidence on the trial, should have attracted his notice. It is true that the order referred to is not found to be a written order, as, it has been contended for the prosecution, was essential to render it legal, but the fact that an order existed, albeit it should be held to be an illegal order, must necessarily have great weight in considering the bearing of Section 220, I. P. C., in which knowledge that the act is contrary to law is part of the definition of the offence, on the conduct of the accused.

The case has been argued before us at considerable length by Mr. Leith in support of the Session Judge's reference, and by Mr. Anstey on behalf of the acquitted persons.

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Mr. Leith's argument put shortly amounts to this, that an illegal arrest is a violation of the criminal law, subjecting the offender to punishment under Section 220 of the Penal Code, malice being presumed on proof of the unlawful act ; that the accused were not justified in arresting the complainant upon the order of Mr. Trenn, because that order was not in writing as required by Section 140 of the Criminal Procedure Code ; and that the circumstances within their knowledge were not such as to warrant the existence of a reasonable suspicion against the complainant upon which alone, under Section 100 of the Procedure Code, the accused could spontaneously have made the arrest.

It has been found in clear terms by the Assistant Session Judge that the accused were acting under the orders of their superior, Mr. Trenn ; and it is not suggested that they corruptly or (apart from the alleged illegality of their act) maliciously arrested the complainant, or that, in making the arrest, they actually knew they were acting contrary to law. Indeed, it was pressed upon us more than once that only a nominal punishment was desired as a lesson to the Police to be more circumspect in future in making arrests.

The main point we have then to consider is the construction to be placed upon Section 220 of the Penal Code ; for on the determination of that depends the question, not only of the correctness of the Assistant Session Judge's order, but of our power to review that order. If malice is to be presumed, then no doubt this reference is on a matter of law ; but if, on the other hand, express malice or actual knowledge must be proved, then the finding of the Assistant Session Judge which is objected to was on a matter of fact. The words of the section, so far as they are applicable to the present case, run thus :—"Whoever being in any office which gives him legal authority * * to keep persons in confinement * * maliciously * * keeps any person

1872. in confinement in the exercise of that authority, knowing
 REG. that in so doing he is acting contrary to law," &c. Mr.
 v. Pinhey holds that "malice is to be presumed when an un-
 NA'RA'YAN lawful act was clearly committed unless the absence of ma-
 BA'BA'JI. lice is proved," though in another part of his remarks
 he observes that he did "not, of course, mean to imply
 * * * that policemen are liable to a prosecution for a
 criminal offence, whenever in the discharge of difficult
 duties they commit mistakes, which well-meaning men
 may commit without intending to break the law. Indeed it
 is quite possible that they may commit mistakes for which
 they would be liable in a Civil Court, and which yet would not
 constitute a criminal offence;" but if guilty knowledge is
 not to be taken as the very essence of the offence against
 the criminal law, we fail to understand the distinction which
 exists in the Session Judge's mind between a civil action and
 a criminal prosecution for false imprisonment. In either
 case, given the unlawful character of the confinement, it
 would be for the defendant to prove the justification, or
 excuse; and, failing that, the law would imply that he
 had acted maliciously, or with a criminal intent, so that
 whether his purse or his liberty were in peril, unless the
 defendant could establish, as a matter of fact, reasonable
 and probable cause, he would stand condemned, as a matter
 of law, of an illegal confinement. Mr. Murphy has ruled
 that the penal enactment under consideration contemplates
 some wilful excess of authority; in other words, a guilty
 knowledge superadded to an illegal act: and in coming
 to this conclusion we think that he has rightly interpret-
 ed the intention of the Legislature. Whether or no that
 knowledge exists, must of course be inferred from the cir-
 cumstances of each case, but that question is one of fact and
 not of law, and any finding thereon in a case of acquittal,
 whether right or wrong, must be conclusive. In the
 course of argument the existence of an analogy was much
 insisted on between the case of a soldier under the English
 law, and that of a policeman under this Section 220; and
 the following passage in Mayne's Commentary on the Penal
 Code, speaking of the soldier, was read out to us—"His mis-

take, if he labours under one, must be a mistake of fact and not a mistake of law. If he erroneously supposes his superior officer to be authorized to issue orders which are illegal, he will be guilty, and his mistake can only go in mitigation of punishment or as a ground for an absolute pardon."* No doubt the soldier under the English law is placed in a very hard position "a fronte præcipitium, a tergo lupi"; but assuming Mr. Mayne's interpretation generally of the view taken by the framers of the Code to be correct, we think, with the Assistant Session Judge, that in this particular instance the law has provided that the command of superior authority must be manifestly illegal, and will not infer a guilty knowledge. In concluding our remarks on this case, we must observe that, supposing we had the power to interfere with Mr. Murphy's finding on the evidence, it is to our minds justified by the facts, a point which was not disputed by the learned Counsel who ably argued the case in support of the Session Judge's reference; and we cannot but express our surprise at the persistent course pursued by the complainant against these police subordinates long after their superior, Mr. Trenn, had come forward to claim the whole responsibility of their acts.

The second head of the charge depends on the first.

We direct that the papers be returned.

* p. 47—(6th edin).

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1872.
Sept. 5.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. AHONE AKONG.

*Violation of conditions of remission of punishment—Jurisdiction—
Indian Pen. Code, Sec. 227.—Crim. Proc. Code, Sec. 33.*

A person convicted by the Recorder's Court of Prince of Wales's Island, Singapore, and Mallaca, of the crime of Burglary, and sentenced to transportation for ten years, at a place to be appointed by the Governor General of India in Council, was released from the Ratnagiri jail on a ticket-of-leave after having been in confinement for more than eight years. At Karedar he committed theft in a dwelling house before his sentence had expired.

Held that the Full Power Magistrate at Kárwár had jurisdiction to try the convict for the offence of violation of the condition of remission of punishment under Section 227, Indian Penal Code.

THIS was a reference from the District Magistrate of North Kanara for the orders of the High Court under Section 434 of the Code of Criminal Procedure.

The facts were briefly as follows :—

The accused Ahone Akong was convicted by the Court of Judicature of Prince of Wales's Island, Singapore, and Malacca, of Burglary, and was sentenced by the Recorder "to be transported beyond the seas to such place as the Governor General of India in Council may direct and appoint, for the term of ten years." In pursuance of this sentence he suffered imprisonment in the Ratnagiri jail for a period of eight years, one month, and fifteen days, at the end of which he was permitted to reside at Kárwár on a ticket-of-leave issued by the Inspector General of Prisons. While at Kárwár the accused committed the offence of theft in a dwelling house, and was tried and sentenced, on the 10th of March 1872, by Mr. Ingle, Magistrate, to fifteen months' rigorous imprisonment. After passing this sentence the F.P. Magistrate tried and convicted the accused of violation of condition of remission of sentence under Section 227 of the Indian Penal Code, and sentenced him to suffer such portion of the punishment to which he was originally sentenced by the Recorder as he had not already suffered.

With regard to the case of theft in a dwelling house which was No. 41 in the F. P. Magistrate's Calendar, the District Magistrate suggested that the proceedings should be reversed ; and with regard to the latter, he doubted whether any court in British India had jurisdiction.

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P.
AHONE
AKONG.

The reference was heard by LLOYD AND KEMBALL, JJ.

PER CURIAM :—The offence of which the accused was originally convicted by the Recorder's Court answers to house-breaking by night, with intent to commit theft, under the Indian Penal Code, which offence is triable (vide Column 7 of the Schedule to the Criminal Procedure Code under Sec. 457) by a F. P. Magistrate. And, in order to give force and effect to the provisions of Section 33, Criminal Procedure Code, the words "by the Court by which the original offence was triable," (Schedule under Section 227) must be taken to mean by any court empowered by law to try any such an offence as that for which the convict was under sentence.

Mr. Ingle, therefore, had power to sentence the convict to suffer so much of the punishment as he had not already suffered, that term being manifestly within his powers ; though he should have determined and declared the exact term of punishment the convict was required to undergo in consequence of breaking the conditions of his ticket-of-leave.

As regards the theft case the court does not understand why the District Magistrate should have suggested that "the proceedings should be reversed."

Order accordingly.

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Oct. 8,

[ORIGINAL CRIMINAL JURISDICTION.]

REG. V. NAVROJI DA'DA'BHA'I.

Evidence—Confession—Inducement—Person in authority—Practice in Criminal trials—Letters Patent, Cl. 26—Powers of High Court when point of law is reserved—Alteration of sentence—Indian Evidence Act, Secs. 24 and 167.

W., a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the account of the prisoner, who was a booking clerk of the Company, went to him and told him that "he had better pay the money than go to jail" and added that "it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rs. 826-8-0. The prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of this and of other sums:—

Held that the words used by W., the travelling auditor, constituted an inducement to the prisoner to confess, and that W. was a person in authority within the meaning of Section 24 of the Indian Evidence Act, and that the receipt signed by the prisoner was, therefore, not admissible in evidence on his trial.

Held also (Bayley, J., *dissentiente*) that the High Court, in considering a point of law reserved under Cl. 26 of the Letters Patent, where it is of opinion that evidence has been improperly admitted as to one of two heads of charge of which a prisoner stands convicted (the two heads of charge relating to distinct and separate offences) and that the conviction on such head of charge is bad, has power to review the whole case and, if it appears that the evidence improperly admitted could not reasonably be supposed to have influenced the jury as to the latter head of charge, ought not to set aside the conviction on that head of charge but should proceed to pass judgment and sentence on it.

Seemle. Sec. 167 of the Indian Evidence Act applies to criminal trials by jury in the High Court.

NAVROJI DA'DA'BHA'I and one Harichand Ganpat were tried, before Green, J., and a special jury at the fourth Criminal Sessions of 1872, on the following heads of charge:—

I.—That Navroji Dádábháí and Harichand Ganpat, on the 2nd day of July 1872, committed criminal breach of trust as clerks of a sum of Rs. 729-6-9.

II.—That on the same day Navroji Dádábháí committed criminal breach of trust as a clerk of the same sum and that Harichand Ganpat abetted him.

III.—That on the same day Harichand Ganpat committed criminal breach of trust as a clerk of the same sum and Navroji Dádábhái abetted him.

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IV.—That Navroji Dádábhái and Harichand Ganpat, on the 5th July 1872, committed criminal breach of trust as clerks of a sum of Rs. 826-8-0.

V.—That on the same day Navroji Dádábhái committed criminal breach of trust as a clerk of the same sum and Harichand Ganpat abetted him.

VI.—That on the same day Harichand Ganpat committed criminal breach of trust as a clerk of the same sum and Navroji Dádábhái abetted him.

In the 7th, 8th, 9th, 10th, 11th, and 12th, heads of charge the same prisoners were charged with dishonest misappropriation of the aforesaid sums of Rs. 729-6-9 and Rs. 826-8-0, or with abetment of the other prisoner in so doing, corresponding *mutatis mutandis* to the first six charges.

The prisoner Navroji Dádábhái was found guilty by the jury on the 2nd and 5th heads of charge, no verdict being recorded on the remaining heads, and was sentenced to three years' rigorous imprisonment. As to the prisoner Harichand Ganpat, the jury were not able to agree on a verdict and were discharged.

The learned Judge (under Clause 25 of the amended Letters Patent) reserved, for the opinion of the High Court, the point of law whether a receipt for the sum of Rs. 826-8-0, referred to in the 4th, 5th, and 6th heads of charge, given by the prisoner Navroji Dádábhái was properly admitted in evidence. The circumstances under which this point arose, appear from the case stated by the learned Judge. It was as follows :—

“Mr. Wainwright, the first witness for the prosecution, (who was Travelling Auditor in the service of the G. I. P. Railway Company, the prosecutor, and who discovered the deficiencies in respect of which the charges were made) in cross-examination by Mr. Anstey, Counsel for the prisoner

1872. Harichand Ganpat, stated as follows :—‘ I recommended
 REG. Dádábháí (*i.e.*, the first prisoner) to pay the money. I went
 NAVROJI to his house ; he offered Rs. 2,000. He could not raise the
 DA'DA'BHA'I. whole (*i.e.*, of the deficiency). This was on the 11th (*i.e.*,
 July 1872). On the 12th, the prisoners were suspended.
 The prisoners were not arrested. Dádábháí said he would try
 to raise the money and that he would remain at the station.
 Mr. Keily first charged Harichand in my presence on the
 12th.’ In cross-examination by Mr. Inverarity, the Counsel
 for Navroji Dádábháí, the same witness stated : ‘ When I
 saw the first prisoner, I told him he had better pay the mo-
 ney than go to jail and that it would be better for him to
 tell the truth.’ * * *

“ Then Mr. Keily was called. In his examination-in-chief
 he stated : ‘ Mr. Wainwright brought Navroji Dádábháí to
 my office and said he was a defaulter to the extent of about
 Rs. 3,000. After the conversation with me, I don't think
 Navroji ever returned to his house. I asked Navroji to
 explain the cause of the defalcations. In my presence no
 inducement or threat was offered to Navroji either by me or
 by Mr. Wainwright.’ (Here Mr. Inverarity objected to any
 thing in the nature of a confession or admission by Navroji
 to Mr. Keily being given in evidence and referred to Secs. 24
 and 28 of the new Evidence Act. At a suggestion from me
 Mr. Marriott, Counsel for the prosecution, did not further
 press the matter and no evidence was given as to what
 Navroji said to Mr. Keily.) So far no point arose which
 was reserved or asked to be reserved, and I have stated the
 evidence so far in order that the Court may appreciate the
 point which subsequently arose. One set of the charges, it
 will have been observed, related to criminal breach of trust
 and dishonest misappropriation, on 5th July 1872, of a
 sum of Rs. 826-8-0—charges quite distinct in themselves,
 and in respect of the evidence given in support of
 them, to the charges which had reference to the sum
 of Rs. 729-6-9 on the 2nd July 1872. This sum of
 Rs. 826-8-0 was a sum received in the office of the Traffic
 Manager at Boree Bunder Station during the first few days

of July for season tickets and which, it was alleged, had been, according to the practice, taken by a clerk in that office to the office of the Coaching Department at the same station, in which last named office the two prisoners were clerks. The case was that a clerk from the Traffic Manager's office had, on the 5th July, taken the Rs. 826-8-0 and paid it to the prisoner, Navroji, whose duty it was to pay it over to the prisoner, Harichand Ganpat, the head clerk in the Coaching office, for transmission to the Company's cashier. One Mahádev Gopál (a clerk in the Traffic Manager's office at the Boree Bunder Station) was called and stated: 'Between the 1st and 5th July 1872 certain season tickets were issued (i.e., in the Traffic Manager's office). The money received for these tickets was Rs. 826-8-0. I paid that money over to Navroji Dádábhái on the 5th July. I was in the habit of paying to Harichand Ganpat or Navroji Dádábhái. On this occasion I did so to Navroji Dádábhái in the presence of, and by the direction of, Harichand Ganpat. I got no receipt then. I got a receipt afterwards.' (A document was shewn to witness which was afterwards marked as Exhibit E.)

"Mr. Inverarity then objected to the reception of this document which purported to be signed by Navroji Dádábhái and to bear date the 11th day of July 1872, and to acknowledge the receipt from the witness, Mahádev, on the 5th July 1872 of a sum of Rs. 826-8-0, as being irrelevant and inadmissible under Sec. 24 of the new Evidence Act, and requested me to read the cross-examination before the Committing Magistrate as to this point of Mr. Keily and of the witness, Mahádev Gopál. Having done so, I asked Mr. Marriott if he pressed the reception of the document. He said: 'Yes, there is no evidence of any threat or inducement causing Navroji to sign this receipt.' After some discussion I held the document admissible, even assuming that the receipt taken in conjunction with the circumstances could be regarded as a confession within Sec. 24. It did not appear to me that the signing of the receipt by Navroji was caused by any inducement, threat, or promise within Sec. 24 of the Act. I

1872. said, however, that if Mr. Inverarity desired it, I would
 REG. reserve the question as to the admissibility in evidence of
 NAVROJI Exhibit E for the consideration of the High Court, where-
 DA'DA'BHA'I. upon Mr. Inverarity stated that he desired such question
 to be so reserved. The witness then said in answer to
 Mr. Marriott: 'Navroji gave the receipt on the 11th July.
 It bears his signature'. (Here the receipt was put in and
 marked E) when the witness went on: 'Mr. Keily asked
 him (that is Navroji) if he had received the money from
 Mahádeo (*i.e.*) the witness. He said "Yes." Upon that
 Mr. Keily said to him: "Then give a receipt for it." He
 gave this receipt.' On the cross-examination by Mr. Inve-
 rarity, the witness said: 'On this occasion (*i.e.*, on the 5th
 July) I paid Rs. 826-8-0 without any receipt that day. When
 this document (*i.e.*, Exhibit E) was signed, Mr. Keily,
 Mr. Wainwright and one Chintáman Báburáv were present.
 The whole list of these figures was in my handwriting.
 Mr. Wainwright's name is as a witness. Afterwards on the
 11th of July I did not hear Mr. Wainwright say to Navroji
 that he would go to gaol or anything to that effect. I did
 not hear Mr. Keily say anything about paying up the money
 at that time (that is when the witness brought the document
 from the Traffic Manager's office to where Navroji was).
 Navroji was in Mr. Keily's office. He was not brought
 there by Mr. Wainwright. I found him sitting on a chair.
 I had prepared the document on the day I brought it.
 When I produced the paper, Mr. Keily said to Navroji, "If
 you have received the money, sign the paper." He (Nav-
 roji) looked at the document and saw the result. He had
 only to see that the amount received was represented there.
 Mr. Keily did not say to Navroji, while I was there, that it
 would be better for him, if he signed the receipt. In re-
 examination by Mr. Marriott, the witness says: 'I had
 previously got receipts signed by Navroji. This is one,
 (receipt of October 1870 put in and marked Exhibit H).
 Exhibit E shewn to witness again: 'In the handwriting
 of Navroji are the whole of the words "Received from
 Mahadarow (*i.e.*, the witness Mahádev Gopál) the sum of
 Rs. 826-8-0 only on the 5th July 1872.—N. D. 11-7-72."

"The question reserved for the opinion of the High Court is, whether the document marked as Exhibit E was properly admitted as evidence against the accused Navroji Dádábhái."

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The point reserved came on for argument before SARGENT, Acting C.J., and BAYLEY and GREEN, JJ., on the 28th of September 1872.

Marriott (with him Farran) in support of the conviction :— Mr. Wainwright was not a person in authority within the meaning of Section 24 of the Indian Evidence Act 1872. A person in authority means a person who has control over the prosecution of the accused : *Reg. v. Hannah Moore (a)*, *Reg. v. Sleeman (b)*, *Reg. v. Taylor (c)*. Mr. Wainwright had no such control ; he was merely a fellow clerk of the accused ; his duties, as an auditor appointed to go through the accounts of the Boree Bunder Station, were merely to check those accounts and report to his and the prisoner's common superiors. To treat him as a person in authority would be fraught with the dangers pointed out by Mr. Taylor in para. 801 of his work on evidence. Assuming Mr. Wainwright to have been a person in authority, yet, before the evidence given subsequently to an inducement held out by him should be rejected, it must appear to the Court that the confession was caused by such inducement. All the circumstances of the case, the character of the man holding out the inducement, the time and place when and where it was held out, must be taken into account. This the Judge, who tried the case, did, and he admitted the evidence. This Court will not interfere with his discretion.

If the Court is against me on these points, then I say that Exhibit E had no bearing whatever on the first three heads of charge, and on the second three heads of charge there was ample evidence to warrant the finding of the Jury without having recourse to Exhibit E. Under these circumstances, the Court will not interfere with the judgment that

(a) 2 Den. Cr. Ca. 522. (b) 23 L. J. Mag. Ca. 19.

(c) 8 Car. & P. 733.

1872. has been given : Letters Patent of 1865, Cl. 25 and 26, and
 REG. Indian Evidence Act, Sec. 167.

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Anstey and Inverarity for the prisoner :—Wainwright was clearly a person in authority. He it was who was set to detect, and did detect, the defalcations of the prisoner : *Reg. v. Warringham (d)*, *Thomas v. Rhymney Railway Co. (e)*, *Baldry's case (f)*. Archibold lays down the law on this point at page 199 of his work on evidence in criminal cases, 15th edn. Wainwright was concerned in arresting the prisoner ; and it was he who brought him before Mr. Keily, and that alone would render Wainwright a person in authority : case cited at p. 527 of the Report of *Hannah Moore's case (g)*, *Reg. v. Upchurch (h)*, *Reg. v. Paratt (i)*, cited with approbation by Mr. Russell : see III. Russell on Crimes, p. 386 (4th edn.), Taylor on Evidence, para. 802. There was a direct inducement held out : *Reg. v. Hearn (j)*. The whole of the confession ought to have been rejected. When once there was evidence of inducement, however slight, no confession ought to have been admitted, until it was proved that the effect of such inducement had been entirely removed : *Rex v. Nute* and *Rex v. Sexton*, cited at III. Russell on Crimes, p. 378, *Sherrington's case (k)*, *Reg. v. Hewett (l)*.

If the evidence has been improperly admitted, the prisoner is entitled to his discharge, for this Court cannot say how much or how little weight Exhibit E had on the minds of the jury. It may have affected, and probably did affect, their finding on each of the charges ; but even if that were not so, this Court has no power to alter the judgment that has been pronounced. It must either confirm or annul it. It cannot direct judgment to be entered on what it may consider to be a good head of charge and direct an acquittal on the other. That would be virtually for the Court to place itself in the position of the jury, which is

(d) 2 Den. Cr. Ca. 447. 15 Jur. 318. (e) L. Rep. 5 Q. B. 226 ; 6 Ib. 266.

(f) 2 Den. Cr. Ca. 430, 447. (g) 2 Den. Cr. Ca. 527.

(h) Mood. Cr. Ca. 465. (i) 4 Car. & P. 570.

(j) Car. & M. 109. (k) 2 Lew. 123.

(l) C. & M. Cr. Ca. 534.

contrary to all precedent and to practice. Clause 26 of the Letters Patent must be read by the light of the previously prevailing practice in England and India. It certainly gives the Court no more power than is conferred on the Court for Crown cases reserved in England by Statute 11 & 12 Vict., c. 78; and the practice of that Court, when evidence has been improperly received on the trial of a prisoner, is to annul the conviction and direct the prisoner to be discharged. Nor can this Court order a new trial, as this is a case of felony: *Reg. v. Bertrand* (m), and *Reg. v. Murphy* (n), overruling, so far at least as this Court is concerned, the case of *Reg. v. Scaife* (o). As judgment has been entered up generally, even supposing the judgment as to one count to be good, the judgment is void: *O'Connell's case* (p). Lastly Sec. 167 of the Indian Evidence Act is merely the re-enactment of a section (57) of the Evidence Act II. of 1855, and only applies, as the latter section also only applied, to civil cases. *Reg. v. Frewin* (q) was also cited.

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Marriott in reply :—The two charges were essentially distinct and unconnected. The offences were committed on different days. The Letters Patent expressly give the Court power to alter the sentence and to pass such judgment and sentence as to the High Court may seem fit. *O'Connell's case* is no longer law, if it ever was law in India: Stat. 11 & 12 Vict., c. 78, s. 5; *Holloway. v. The Queen* (r).

Cur. adv. vult.

SARGENT, C.J. :—This case comes before the Full Court on a point of law reserved by Mr. Justice Green, under the 25th and 26th sections of the Letters Patent of 1865, on the trial of Navroji Dadabhái and Harichand Ganpat at the Criminal Sessions in September last.

The prisoners were tried on the following charges. (His Lordship stated the charges as given in the case and proceeded :—) The prisoner Navroji Dadabhái was found guilty

(m) L. Rep. 1 P. C. 520. (n) L. Rep. 2 P. C. 535.
(o) 17 Q. B. 238; S. C. 2 Den. Cr. Ca. 281. (p) 11 Cl. & F. 155.
(q) 6 Cox, Cr. Ca. 530. (r) 2 Den. Cr. Ca. 287; 17 Q. B. 317.

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by the jury of the second and fifth charges and was sentenced by Mr. Justice Green to three years' rigorous imprisonment. As to the prisoner Harichand Ganpat, the jury were not able to agree on a verdict and were finally discharged.

The point of law was reserved by the learned Judge under the following circumstances. (His Lordship read the special case and proceeded :—) The question reserved for the opinion of this Court is whether the document marked as Exhibit E was properly admitted as evidence against the accused Navroji Dadabhái.

The answer to this question depends upon the application of Secs. 5 and 24 of the Indian Evidence Act of 1872, which came into force on 1st September last, and by Sec. 1 is made applicable to all judicial proceedings in or before any Court, and, by Sec. 2, repeals all rules of evidence derived from any other source.

Sec. 5 provides that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are thereafter declared to be relevant and of no others.

By Sec. 6, the confession by the prisoner that he had received the sum of Rs. 826-8-0 from Mahádev Gopál would be a relevant fact.

By Sec. 24, however, "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The rule of English law relating to confessions of this nature has been variously stated by different Judges.

In *Rex v. Thomas* (s), Mr. Justice Coleridge lays down that the proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one, and that rule was substantially adopted by Mr. Justice Littledale in *Rex v. Court* (t). However in *Rex v. Baldry* (u), we find Lord Campbell saying "that the rule is that if any worldly advantage be held out or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias and that, therefore, it would be better not to submit it to the jury."

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The rule, as laid down in the section in question, appears to be worded in accordance with a suggestion expressed by Mr. Baron Parke in *Rex v. Hannah Moore* (v). He there says : "The cases on this subject have gone quite far enough and ought not to be extended. It is admitted that confessions ought to be excluded unless voluntary, and the Judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary, is whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held that in all cases the Judge was to determine that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat."

Sec. 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.

Now, the confession in question was made at the office of Mr. Keily, the Assistant Traffic Manager, where he had

(s) 7 C. & P. 345.

(t) 7 C. & P. 486.

(u) 2 Den. C. C. 430.

(v) 21 L. J. Mag. Ca. 199.

1872. been taken by Mr. Wainwright. He was there asked by
 REG. Mr. Keily if he had received the money from the witness
 NAVROJI Mahádev on which he said "yes." Mr. Keily upon that said
 DA'DA'BHA'I. to him : " Then give a receipt for it ;" and he there and then
 gave a receipt, which is the document E in question, to the
 witness Mahádev. There is no evidence whatever of any
 threat or promise having been used or held out on that oc-
 casion ; and if the case turned simply upon what took place
 before Mr. Keily, there would be clearly nothing to make
 the confession irrelevant under Sec. 24 or to prevent the
 admissibility of the document E as evidence under Sec. 5.
 But it was said that the making the confession was caused
 by the inducement, threat, or promise which, it was con-
 tended, was contained in the words which Mr. Wainwright
 had previously addressed to the prisoner at his own house,
 namely, " That he had better pay the money than go to gaol ;
 and that it would be better for him to tell the truth."

A preliminary objection was taken by the prosecution that Mr. Wainwright was not a person in authority. No defini-
 tion or illustration is given of the expression " person in
 authority." It is an expression well known to English law-
 yers on questions of this nature ; and although, as all rules
 of evidence which were in force at the passing of the Act
 are repealed, the English decisions on the subject can
 scarcely be regarded as authorities, they may still serve as
 valuable guides.

Now, Mr. Wainwright had been previously employed by
 the Company as one of its travelling auditors. He had re-
 turned from England but a few days before the occurrence
 in question, and had been appointed to duty connected with
 the Audit Department at the Boree Bunder Station. He sat
 in the Coaching Office, he says, as a clerk and checked the
 books in the Office. He was engaged in re-auditing accounts
 already audited, namely, those of the month of June, and
 also checking the accounts of July before the usual time for
 auditing had arrived. It is plain, therefore, that he had once
 filled an important post under the Company, namely that of

travelling auditor, and was then engaged on special service. Whilst employed in this special duty, he discovers the defalcations in the accounts in respect of which the charges are made; he proceeds to the prisoner's house to examine him on the subject, not as a friend as suggested by the prosecution, for we find him immediately afterwards taking him before his superior officer, Mr. Keily, but in his official capacity after he had formed the opinion that the prisoner was bound to account for the deficiencies, for he says he had told Harichand that prisoner was deficient.

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Under these circumstances, it appears to me impossible, unless a very restricted and literal meaning is to be given to the expression "person in authority," to hold that Wainwright was not a person in authority. He would clearly be so, I think, according to English authorities. The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority as in the *Queen v. Warringham (w)*, where Parke Baron held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority; and we find the rule so laid down in Archibold's Criminal Practice.

Assuming that Wainwright was a person in authority within the section, did the words addressed by him to the prisoner amount to an inducement, threat, or promise sufficient to give him grounds which would appear to him reasonable that he would, by confessing, gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him?

His words "you had better pay the money than go to gaol and that it would be better for him to tell the truth" appear to me to bear but one construction, and that is, "you must know all about these deficiencies, and you had better therefore at once confess the truth and pay and so avoid being sent to prison where you certainly will be, if you do not do so."

(w) 2 Den. C. C. 447n.

1872. They operate as an inducement by the suggestion which they
 REG. carry with them that he would certainly be sent to gaol, if
 v. he did not confess and pay, and that if he did, he would not
 NAVROJI be sent. That these words would, according to English
 DA'DA'BHA'I. authorities, be regarded as an inducement, cannot be doubt-
 ed. It is only necessary to refer to C. Baron Pollock's judg-
 ment in *Baldrys' case* (x). And I must say that coming
 from a man in Wainwright's position, whose business it was
 to report to the authorities of the Company and who had it
 in his power to represent the matter in any light he might
 think proper, the inducement may well be deemed sufficient
 to operate upon the mind of a man placed in the position of
 the prisoner so as to lead him to suppose he would escape go-
 ing to gaol by confessing and paying. Undoubtedly, he was
 not led to expect any advantage from merely telling the
 truth; but the confessing was the first step in the course of
 action which was to insure it, and he clearly contemplated
 trying to complete it by offering Rs. 2,000 and saying he
 would try to raise the money from his friends and by remain-
 ing, as Mr. Baker says, for a week at the Station in the ex-
 pectation of paying.

I cannot, therefore, doubt that the words in question were
 sufficient to render any confession inadmissible made before
 the impression had been fully removed. Had it then been
 removed before the confession was actually made? I think it
 would be contrary to all the probabilities of the case to
 suppose, as it certainly would be opposed to all English
 authorities to hold, that the confession had been effaced in
 the short interval which, on the evidence must be taken to
 have elapsed between the conversation at the prisoner's
 house and his interview with Mr. Keily. The prisoner
 walked with Mr. Wainwright to Mr. Keily's office, and no-
 thing was said to him by Mr. Keily to remove the impres-
 sion at that interview. I can come, therefore, to no other
 conclusion than that the document was inadmissible in
 evidence.

That being so, it remains to determine what is the judgment and sentence which this Court ought to pass in exercise of the power given to it by the concluding words of Sec. 26 of the Letters Patent : "That the Court is finally to determine such point or points of law and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." It was contended for the prisoner that the judgment or sentence so to be passed must be in accordance with the procedure and practice in use in the late Supreme Court, by which, according to Sec. 38 of the Letters Patent, it is provided that, subject to such laws and regulations as should thereafter be made by the Governor General in relation thereto, the proceedings in all criminal cases which should be brought before this Court in the exercise of its Ordinary Original Criminal Jurisdiction should be regulated; and that the only judgment in this case which could be passed in accordance with such practice, would be to declare the conviction on both the second and fifth counts bad, to reverse the judgment or sentence of the Sessions Judge and to order the prisoner to be discharged.

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Now, assuming for the moment that, independently of the operation of the new Evidence Act, our judgment ought to be in accordance with the practice of the late Supreme Court, is the conclusion contended for borne out by what was, or must be deemed to have been, the practice of that Court? The records of that Court do not, it appears, afford any decision in point. The practice, however, of the Supreme Court was undoubtedly in the main that of the Courts in England.

Now, at page 213 of Russell on Crimes it is stated as the English practice that if a case be clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because some other evidence was given which ought not to have been received; but if the case without such improper evidence were not so

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clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The learned writer then proceeds : " But as it seems now to be settled that where evidence, objected to on the trial of a cause, is received by the Judge and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial on the ground that it is impossible for the Court to say what effect such evidence may have produced on the jury ; it may well be doubted whether, if the Judges were of opinion that any evidence had been improperly admitted or rejected in a criminal case, the conviction would be supported."

The doubt as to the practice, it is to be observed, depends upon the power to direct a new trial in felony which, it was then supposed, had been established by the case of *Reg. v. Scaife* (y). That case, however, since the decisions of the Judicial Committee of the Privy Council in *Rex v. Bertrand* (z) and *Rex v. Murphy* (a), must be considered of very doubtful authority even in England.

The authorities cited by Mr. Russell in support of the practice as first stated by him are *Rex v. Tinkler* (b), *Rex v. Ball*, (c) and *Rex v. Oldroyd* (d). In the latter case all the Judges expressed an opinion that the doctrine said to have been laid down in *Margaret Tinkler's case* was sound, namely, that although evidence had been improperly received, yet that the case appearing clear against the prisoner without that evidence, it was no reason to stay the execution.

In *Rex v. Ball* all the Judges expressed the same opinion. The report says : " Whether the Judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the Judges seemed to think, must depend on the nature of the case and the weight of the evi-

(y) 17 Q. B. 238.

(z) L. R. 1 Priv. C. 520.

(a) L. R. 2 Priv. C. 535. (b) East P. C. 354.

(c) R. & R. 132.

(d) R. & R. 68.

dence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought, that as there could not be a new trial in felony, such a conviction ought not to be set aside, because some other evidence had been given which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The conviction in this case was held right."

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It is to be remarked that in neither of the cases was it necessary to act on the doctrines, as the Judges considered the evidence was admissible.

In the latter case, however, the doctrine was apparently fully discussed, because one of the Judges thought the evidence in question wholly inadmissible.

Whether the doctrine was so laid down in *Tinkler's case*, which took place in 1781, may perhaps be doubted. At page IV. of the preface to 1st volume of Denison's Crown Cases, a doubt is thrown, apparently on the authority of a manuscript note by Lord Denman to his copy of Russell and Ryan, on the accuracy of the note to *Ball's case* in Russell and Ryan ascribing the doctrine to the Judges in *Tinkler's case*. It certainly does not appear clear from the report in East P. C. that any part of the evidence, as is assumed in the note to Russell and Ryan, was considered inadmissible. However, there is no reason to doubt that all the Judges in 1807 expressed their approval of the above doctrine in *Ball's case*, Lord Denman in his note to his copy of Russell and Ryan says "Quære this doctrine", and cites *Reg. v. Sutton (e)*, and *Edwards v. Evans (f)*. But the former case only decides that the Court would not grant a new trial in an indictment for the non-repairing of a bridge, the verdict having been for the defendant; and in the latter, which was an action under

1872. the Bribery Act, the Court refused a new trial because the
 REG. rejected evidence was not material. In this case the Court
 v. took upon itself to say that the jury would have come to
 NAVROJI the same decision in any case, and so far supports the prac-
 DA'DA'BHA'I. tice contended for. I have been unable to find any decisions
 in the Crown cases reserved under the 11th & 12th Vict,
 c. 78, which bear upon this question of practice.

In view of the above authorities the right conclusion would appear to be that there has not been any well established uniform practice in England as to the course to be pursued where evidence had been improperly admitted.

I have so far considered the question independently of the 167th section of the new Evidence Act, which provides that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

The words of this section are identical with those of Sec. 57 of Act II. of 1855; but the latter Act contains no express words making it applicable to all Courts whatever, and it might be doubted whether all its provisions were intended to be enforced in all proceedings, criminal as well as civil. However, in *Reg. v. Rámsvámi Mudliár* (g) Sec. 57 was held to be applicable to this Court on its Appellate Jurisdiction in the case of an appeal from the sentence of the Session Judge of Púna, where the prisoner had been tried and convicted by a jury.

But whatever doubt may have arisen under the Act of 1855, the provisions of the new Evidence Act are made applicable by the clearest possible words to all judicial proceedings in or before any Court, and are, therefore, applicable

to this Court, sitting under Sec. 26 of the Letters Patent, 1872.
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 and whatever was or must be deemed to have been the NAVROJI
 practice of this Court before the Act passed, must, by the DA'DA'BHAI.
 concluding words of Sec. 38 of the Letters Patent, be modified by the provisions of the Act so far as they apply to the practice in question.

It was said, however, that the section could not have been intended so to apply, as there was no "decision" and yet, the first question which the Court has to determine, after deciding that evidence was improperly admitted, is whether the verdict of the jury, or in other words, the conviction, should be supported or set aside, *i.e.*, reversed. But what is the verdict but the decision of the jury as to the guilt of the prisoner in respect of the offence with which he is charged.

It was further contended that the Court has only the case stated by the Judge before it, and therefore not necessarily the means of determining the effect of the rest of the evidence, if indeed it can look at anything more. But it is to be remarked that the section does not provide for a case being stated by the Judge as directed by the 11 and 12 Vict., c. 78, nor has such ever been the practice in this Court. The section simply authorizes the Judge to reserve the point of law, and directs the Court to review the case, *i.e.*, I apprehend, all that took place at the trials so far as is necessary for deciding the question of law and passing the proper judgment and sentence.

In the present case the Judge was a member of the Court, his notes of the evidence were referred to during the hearing of the case and we had all the materials for deciding as to the effect of the remaining evidence; I should, therefore, have great hesitation in coming to the conclusion that under those circumstances we ought not to give effect to the 167th section of the new Evidence Act in determining whether the

1872. conviction on both the counts should be set aside and the judgment reversed.

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But at any rate the clear expression of the intention of the Indian legislature, that decisions should not in any case be reversed, if the rest of the evidence justifies the conclusion, should at least, I cannot doubt, influence our practice in cases where, like the present, it may not be yet clearly defined and established, and should, therefore, in the present case, I think, determine it at least within the limits of that practice which met with the approval of all the Judges in *Ball's case* and *Oldroyd's case*, and which, it must be remembered, falls very short of the rule laid down in Sec. 167 of the Evidence Act. This course will be still further justified if it should be held that the Court has no power to order a new trial.

Applying that rule in the present case, I can have no doubt that we ought not to reverse the finding of the jury on the second count relating to the item of Rs. 729-6-9. That item belongs to a perfectly different account from that to which the document E relates. The evidence in support of it was quite distinct and of such a nature as to leave no reasonable ground for supposing that the document E could have had any effect on the minds of the jury. As to the fifth count, we cannot do otherwise than reverse the conviction.

The case stands, therefore, thus, that there has been a general judgment passed on two counts in respect of which the conviction as to one is bad. It was said that in that case the decision of the House of Lords in *O'Connell v. The Queen* (h) applies, and that the judgment must be reversed. Whether the doctrine laid down in that case must be deemed to have been the practice of this Court since the decision of House of Lords, it is unnecessary to consider, as I can entertain no doubt that supposing the judgment bad, the Letters Patent enable us to pass judgment upon the second count on

which there is a good conviction. In *Holloway v. The Queen* (i) this was stated by Lord Campbell to be the effect of 11 & 12 Vict., c. 78, s. 5, the provisions of which, so far as this question is concerned, are the same as those of clause 26 of the Letters Patent.

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The sentence of three years' rigorous imprisonment is, in my opinion, a proper one to pass upon the conviction of a person in the position of the prisoner of such an act of criminal breach of trust as is charged by the second count; and the judgment which this Court should, in my opinion, pass is that the judgment be affirmed.

BAYLEY, J. :— I concur with the Chief Justice in thinking that under Section 24 of the Indian Evidence Act, 1872, the receipt that has been referred to as Exhibit E was not admissible in evidence; and I also concur in considering it doubtful whether we are at liberty to consult English authorities in determining what is the meaning of the expression "person in authority" as used in that section. Upon these points I do not desire to add anything to what has been said by the Chief Justice, and I pass on to consider the far more important question that has been raised in this case, namely, what is the consequence of the admission at the trial of a document which we, sitting to consider a point of law reserved for our consideration, determine to have been inadmissible. Can this Court review the evidence in the case to see whether or not, after rejecting such improper evidence, it ought to sustain the conviction? That question is to my mind one of the utmost importance and deserving of the most careful consideration. In order to arrive at the proper answer to it, I shall briefly consider what was the state of the law in England before the passing of the Stat. 11 & 12 Vict., c. 78, and what was the state of the law after that Statute; and I shall state then what, in my opinion, is the true construction of those clauses of the Letters Patent which must be considered as governing the present case.

(i) 17 Q. B. 317.

1872. For the law in England before the Statute 11 & 12 Vict.,
 REG. c. 78, I refer to Archibold's work on Pleading and Evidence
 in Criminal Cases at page 169 (16th edn.) where he says :
 NAVROJI " The practice has long existed, where any objection was
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 of Oyer and Terminer and Gaol Delivery for treason or felony,
 either to the indictment or the evidence, which the Judge
 considered worthy of more mature consideration, to take
 the opinion of the jury upon the facts proved, and to
 reserve the objection for the consideration of all the judges,
 upon a case stated by the judge who presided at the trial :
 and if the judges, or a majority of them, were of opinion that
 the objection was well founded, the defendant was recom-
 mended to the Crown for a pardon. * * * Upon a case
 so reserved, the judges did not sit strictly as a court, but
 rather as assessors to the judge who tried the case, and the
 judgment ultimately pronounced was considered in law as
 his judgment, the reasons on which it was founded not being
 publicly declared by the judges." In that state of the law,
 it will be observed, the Court had no power of itself to alter,
 or interfere with, the finding of the jury. All it could do
 was to recommend the prisoner to the Crown for a pardon.

It was considered by the legislature advisable to amend the
 law, and accordingly the Statute 11 & 12 Vict., c. 78, under
 the provisions of which the present Court for the considera-
 tion of Crown Cases Reserved was established, was passed in
 the year 1848. The recital in the first section of that Statute
 is important as showing the intended scope of the enactment.
 It is as follows :—" Whereas it is expedient to provide a
 better mode than that now in use of deciding any difficult
 Question of Law which may arise in Criminal Trials in any
 Court of Oyer and Terminer and Gaol Delivery and to make
 further Amendments in the Administration of the Criminal
 Law : Be it enacted that when any Person shall have been
 convicted," &c. The section then goes on to provide that the
 Judge, before whom a case shall have been tried, may, in his
 discretion, reserve any Question of Law, which shall have
 arisen on the Trial, for the consideration of the Court for

Crown Cases Reserved. The second section provides that the Court shall thereupon have full power and authority to hear and finally determine the said Question or Questions and thereupon to reverse, affirm, or amend any Judgment which shall have been given on the Indictment or Inquisition on the Trial whereof such Question or Questions have arisen, or to avoid such Judgment and to order an Entry to be made on the Record that in the Judgment of the Court the Party convicted ought not to have been convicted, or to arrest the Judgment or order Judgment to be given thereon, if no Judgment shall have been given, as they shall be advised, or to make such other order as Justice may require. The section then goes on to provide (His Lordship read the remaining portion of the section and the third and fourth and fifth sections of the Act and the Schedule which provides the form in which the certificate of the Court is to be drawn up, and proceeded :—) There is nothing in that Act which would indicate any, even the slightest, intention on the part of the Legislature to effect such an enormous revolution in the procedure of Criminal Courts, I may say in the history of the liberty of the subject as would have occurred if an appeal upon the facts had been given to the Judges constituting the Court of criminal appeal. Except when powers of summary conviction have been given by Statute, a man is convicted or acquitted by the verdict of his countrymen. To borrow the words of Tindal, C.J., in *O'Connell v. The Queen* (j) : “ In criminal proceedings the jury have no other question before them than whether the prisoner is guilty or not guilty of the charge in the indictment ; no other duty to perform but that of pronouncing him to be the one or the other. They have no concern whatever in assessing or awarding the punishment. It is the province of the Court to pass sentence on the whole or on part of the record as the law requires ; either a fixed punishment, if any Statute has so directed, or if a discretionary punishment is given by law, such measure of punishment as under the particular circumstances the defendant ought to receive ” (p. 240). And Mr. Justice Patte-

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son in the same case observes : " But in criminal proceedings the jurors merely find the party guilty or not guilty ; they have nothing to do with the punishment or with anything at all analogous to assessment of damages in civil cases. The Court is free to give judgment on the whole, or on part of the indictment, as the law may require and no uncertainty can arise. Therefore the reason for the rule in civil actions does not and cannot apply to criminal cases" (p. 260). The Statute 11 & 12 Vict., c. 78, was passed to provide for the argument of any difficult question of law reserved by the Judge and for nothing else. It did not give, nor did it purport to give, the Court power to review the evidence upon which the prisoner had been found guilty.

I now turn to the consideration of the Letters Patent. At the time of the granting of the Letters Patent in 1862, and indeed down to the present time, that Statute (11 & 12 Vict., c. 78) was and is in force in England. The Letters Patent were framed in England by lawyers fully conversant with the then existing law regarding criminal trials and with the practice of reserving points of law for the consideration of the Court established by 11 & 12 Vict., c. 78 ; and it would be but natural to expect they would adopt the improvements recently made in the law of England when framing those provisions of the Letters Patent relating to criminal procedure in the three Presidency towns of Calcutta, Madras, and Bombay, where trial by jury in its pure and unadulterated form had, to go no further back than the first introduction of the Supreme Courts, (*i.e.*), in Calcutta from 1774, in Madras from 1800, and in Bombay from 1823, always been the tribunal before which, under the presidency of one of the Judges of the Supreme Courts, persons had been tried.

The clauses in the Charter of 1862 relating to criminal trials in the Ordinary Original Criminal Jurisdiction are the 21st and following clauses.

The 21st clause is as follows :—" And We do further ordain that the said High Court of Judicature at Bombay shall have Ordinary Original Criminal Jurisdiction within the local limits

- of its Ordinary Original Civil Jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Bombay now has Criminal Jurisdiction."

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The 22nd clause provides that the High Court shall be empowered to try all persons brought before it in due course of law. The 24th is this : " We do further ordain that there shall be no appeal to the said High Court of Judicature at Bombay from any sentence or order passed in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court." And Cl. 25 then provides that " on such point or points of law being so reserved as aforesaid * * * the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right."

The Supreme Court, in its criminal procedure, was guided by the law of England except where it had been altered by legislative authority in England or India. My experience of the practice of that Court only extended from January 1861 until its abolition in 1862 ; but I remember the case tried in December 1861 that generally goes by the name of the *Bhättiá Conspiracy Case*, where an objection was, after verdict, taken by myself as Counsel for some of the defendants to the sufficiency of the indictment, and Sir Mathew Sausse sat with Sir Joseph Arnould to hear the argument on the point. There, however, the pleadings were held by the Court to have been perfectly correct, and the conviction being sustained, the Chief Justice retired from the Bench before Sir Joseph Arnould proceeded to pass sentence on the defendants. In the case of *Regina v. Elmstone and Whitwell and others* (k) I reserved a point of law for the

(k) 7 Bom. H. C. Rep.Cr. Ca. 89.

1872. opinion of the High Court, viz., whether the prisoner could
 REG. be legally convicted upon all or any of the charges, but did
 2. not pass sentence until after it had been determined upon
 NAVROJI which of the charges judgment could properly be entered up.
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The Letters Patent of 1862 did not, I think, make any material difference in the mode of procedure during the progress of a trial from that which had existed in the late Supreme Court, further than by providing for the reservation of a point of law at the discretion of the Presiding Judge for argument before a Full Court, and for the final disposal of the case when such Court had pronounced its opinion upon the point reserved. They clearly did not give the High Court power to grant a new trial, and such could not have been granted by the Supreme Court whilst it was in existence. The general opinion of the profession in England had always been that no new trial could be granted in a case of felony. Here, under the law in force previous to the coming into operation of the Indian Penal Code, the offences of which the prisoner has been convicted, would have been felony (see Act XIII of 1850).

The case of *Reg. v. Scatfe* (l), where a new trial was ordered, broke in upon that rule; but that was a peculiar case, and it seems to have been there assumed that the Court had power to direct a new trial. However, that decision cannot be now treated as good law, for in the case of *Reg. v. Bertrand* (m) (which is an authority binding upon this Court) it was decided that there could not be a new trial in cases of felony. The very important decision of the Lords of the Privy Council in that case has, I think, a material bearing upon the present question. There the prisoner had been tried by the Supreme Court of New South Wales, and the jury, not agreeing, was discharged, and a fresh trial had. On the second trial at the same sittings before another jury, some of the witnesses having been resworn, the evidence given by them at the first trial was by consent read over to them from the Judge's notes, liberty being given both to the prosecution and to the

(l) 2 Den. C. C. 281; 17 Q. B. 238.

(m) Law Rep. 1 P. C. 520.

prisoner to examine and cross-examine. Under these circumstances the Supreme Court of New South Wales granted a new trial, and it was held that it had no power to do so. In giving judgment the Judicial Committee express themselves at page 533 as follows:—"Hitherto it was admitted that they had, except in the instance of *The Queen v. Scaife*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their Lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections, perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion: what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this Committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law, it may seem to be. In saying this, their Lordships desire to be understood as expressing no opinion that the introduction of new trials in Felony would or would not be expedient, or conduce to a more just or more careful administration of the law;" and at page 534 their Lordships say: "It is a mistake, moreover, to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even when he is advised by Counsel, and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing. For thus it will be seen that a most important consideration is forgotten,—that of the jury charged with deciding on the effect of the evidence. It is essential that

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1872. no unnecessary difficulty should be thrown in the way of
 REG. their understanding and rightly appreciating it.”
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That case was followed by *Reg. v. Murphy* (n), where it had been held by the Supreme Court of New South Wales that that Court had power to order that judgment on a verdict be vacated and to grant a *venire de novo*; but Chief Justice Erle, in delivering the opinion of the Lords of the Judicial Committee after referring to *Bertrand's case*, says: “First their Lordships consider that the present case is, in substance, an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. * * * The law on this subject was declared by their Lordships in the former case of *Reg. v. Bertrand*, and we consider that the law so declared governs the present case.” And further on, after referring to the remarks of Blackburn, J., in *Reg. v. Winsor*, the Chief Justice continues: “Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good and the prisoner has been given in charge to a jury in due form of law empannelled, chosen and sworn and a verdict of conviction or acquittal has been returned.”

Now is there in the charter of our Court any intention to vary or depart from the law as thus laid down by the Privy Council? I can see no indication in the clause I have read or in any other clauses of the Letters Patent, that any power to review the evidence was given to us by the Letters Patent further than was necessary to decide the point or points of law reserved for our consideration. The right of appeal is, by Clause 25, expressly negatived; and were we to review the evidence for the purpose, not of deciding the point of law, but of seeing whether there is other evidence sufficient to support the conviction, we should, in effect, supersede, by our judgment on the facts, the verdict already given by the special jury; and, as I said during the argument, I

(n) Law Rep. 2 P. C. 535.

should require clear and unmistakable language in the Letters Patent before I should venture to exercise such a power.

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In Archbold's Practice at p. 165 it is laid down as to the state of the law before the Court of Crown Cases Reserved was established as follows : " But where there appears to be sufficient evidence to support the indictment after rejecting any improper evidence which may have been received, the rule for a new trial will be refused " and a reference is then given to 1 East P. C., p. 354, and Russell and Ryan, p. 88. The case in Russell and Ryan's Crown Cases Reserved referred to there is a decision in 1805 in *Reg. v. Benjamin Oldroyd*. In that case the prisoner was tried before Mr. Baron Graham, at the Lent Assizes for the County of York, in the year 1805, for the murder of his father at Sandal Magna, on the 12th of July 1804, by strangling him. He was convicted upon circumstantial evidence, but the learned Judge respited his execution upon an objection, pressed upon him by the Counsel for the prisoner, as to the admissibility in evidence of a deposition read upon the trial under the following circumstances.

The Counsel for the prosecution at the close of their case observed to the learned Judge that they did not mean to call the mother of the prisoner, Elizabeth Oldroyd, strong suspicions having fallen upon her as having been an accomplice ; but the Judge thought it right, in compliance with the usual practice (her name being on the back of the indictment as having been examined before the Grand Jury), to have her examined, which was accordingly done. The learned Judge, observing upon this examination that the evidence given by the woman was in favour of the prisoner, and materially different from her deposition taken before the Coroner, thought it proper to have the deposition read, for the purpose of affecting the credit of her testimony so given on the trial ; and in summing up the case to the jury he stated that her testimony was not to be relied upon, and left the matter of the prisoner's guilt entirely upon the other evidence. The question reserved for the opinion of the Judges was whether

1872. it was competent to the Judge, under the circumstances
 REG. stated, to order this deposition to be read in order to impeach
 v. the credit of the witness. The case was taken into considera-
 NAVROJI tion at a meeting of all the Judges in Easter Term, 11th of
 DA'DA'BHA'I. May, and again on the 18th of May, 1805, when they were
 all of opinion that it was competent, under the circumstances,
 for the Judge to order the deposition to be read to impeach
 the credit of the witness. It was then considered whether,
 laying the evidence of the prisoner's mother entirely out of
 the case, there was sufficient evidence to go to the jury.
 Graham, B., read to the Judges from his notes the evidence
 given on the trial; and, upon consideration, the Judges were
 of opinion that there was evidence sufficient to go to the
 jury, and that the jury having found the prisoner guilty,
 there were not circumstances sufficient to raise a doubt so
 as to induce any interposition to prevent the law taking its
 course. There is another case in Russell and Ryan on the
 same point reported at p. 132 decided by the Judges in 1807.
 In that case it is said that although it appears upon a case
 reserved that evidence has been admitted at the trial which
 ought not to have been received; yet if the Judges are of
 opinion that there is ample evidence to support the indict-
 ment after rejecting such improper evidence, they will not
 set aside the conviction.

With reference to these cases Mr. Denison, at page 4 of
 the preface to the first volume of his Crown Cases Reserved,
 observes: "The importance of this (printing Crown Cases
 Reserved in the precise words in which they are stated for the
 consideration of the Judges) is obvious; but may be rendered
 more evident by the following instance of an important
 mistake which was pointed out to the Editor by Lord Den-
 man in a note to the case of *R. v. Ball*, R. & R. C. C.
 133, n (b); where it seems probable that the learned Editors
 were misled by an incomplete or inaccurate copy of the case
 reserved.

The marginal note to the case of *R. v. Ball* R. & R. 132,
 is as follows:—

Although it appears, upon a case reserved, that evidence has been admitted at the trial which ought not to have been received, yet, if the Judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction."

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The Report of the opinion of the Judges is as follows (p. 133) :—

"Whether the Judges on a case reserved, would hold a conviction wrong, on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the Judges seemed to think must depend on the nature of the case, and the weight of the evidence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought, that as there could not be a new trial in felony, such a conviction ought not to be set aside (b) because some other evidence had been given which ought not to have been received; but if the case, without such improper evidence, were not so clearly made out and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The conviction in this case was held right."

Note (b) is as follows :—

"In Margaret Tinkler's Case, MSS, C.C.R. 1781, all the Judges thought the evidence of a witness of the name of Parsons (d) ought not in strictness to have been received; but, as the evidence was ample without it, the Judges did not think themselves bound to stop the course of justice. See the facts of this case, I. East P. C., 354. See *Rex v. Treble East. T.*, 1810, post."

The Editor avails himself of Lord Denman's permission to print the following MS. notes (c. d.) made by his Lordship in his copy of Russell and Ryan :—

(c.) "Quære this doctrine. See *R. v. Sutton*, 5 B. Ald. 52, and *Edwards v. Evans*, 3 East 456., Le Blanc's judgment in particular."

The judgment of Mr. Justice Le Blanc, upon which Lord Denman doubted the correctness of the view taken in *Rex v. Ball*, is as follows: "The ground on which new trials are granted, on account of the rejection of a witness who was prepared to give evidence relative to the issue, is that the Court cannot weigh the degree of relevancy, or say what effect any fact that is relevant would have had on the minds of the jury."

That judgment bears out the doubt expressed by Lord Denman as to the correctness of the view said to have

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been taken by the Judges in *Reg. v. Ball*, and I believe that case has not been acted upon in practice and cannot be relied on as a guide, as the Court then followed the case of *Margaret Tinkler*, which had been incorrectly reported. I think that we are in the same position as, I believe, the Judges in England now are when a point is reserved for their consideration under the 11 & 12 Vict., c. 78, and that we have no power to review the evidence and say what has and what has not weighed with the jury.

For the prisoner the case of *Reg. v. O'Connell* was relied upon, and it was said that the judgment in the present case was bad, as it is general on all the counts. Whether I should feel constrained to follow the decision of the House of Lords in that case, if a similar point arose here, I am not at present prepared to say. The decision was arrived at against the opinion of a majority of the Judges, seven being against the view eventually taken by the Lords and two only in favor of it, and ultimately the decision was arrived at by three law Lords against two. The case has been commented on by Lord St. Leonards—see his work on the Law of Real Property, page 31, pl. 21, and it is no longer law in England as Section 5 of the 11th & 12th Vict., c. 78, was passed to prevent a similar miscarriage of justice. Lord Campbell, in the case of *Holloway v. The Queen* (o), says : “On the construction of the Statute 11 & 12 Vict., c. 78, s. 5, I have no doubt that, if there should be one good count, and the rest bad, we should be bound either to give judgment on the good count, or remit the case to the Court below, for them to pass such judgment. It was, indeed, held in *Reg. v. Bourne* (p) that the Court of Error could not give judgment on a valid count, even where there was but one sentence which could be passed. I, as Attorney General, conducted that case on the part of the Crown, and bowed to the decision of the Court, though I doubted its correctness, and my opinion was strengthened by the doubt of my brother Patteson, who will always be to me an oracle of the law. In that case I should have directed further proceed-

(o) 17 Q. B. 327. (p) 7 Ad. & E. 58.

ings in error, but the prisoners had been discharged. It was always my opinion that, where the sentence was discretionary, the Court of Error could not well pronounce the judgment, and the Court below should; but that, if only one judgment could be given, the Court above might safely pass the sentence which ought to have been passed by the Court below. Now, however, it is expressly provided by the late Act, that if judgment is reversed, the Court of Error may either pronounce the proper judgment or remit the record to the Court below, in order that they may do so. And, where the indictment has good and bad counts, so that the Court below ought to have arrested judgment on some and sentenced on others, but they have sentenced on all, the Court of Error is no longer under difficulty, but may itself arrest judgment on the bad counts, and sentence on the good. It has been suggested that this takes place only where a sentence which has been pronounced is the wrong one; but I think the rule applies where the judgment has been improper; as where it proceeds upon several counts and one is defective: and, if we find a good count in the present instance, I do not see any difficulty in our either sentencing upon it or remitting the record for that purpose to the Sessions."

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Reliance was placed by the Counsel for the prosecution on the 167th section of the new Evidence Act. That section was copied from Sec. 57 of Act II. of 1855 which has generally been considered to have applied only to civil cases. The terms of the sections are apt only when applied to such; and I for one shall be slow to construe it, Sec. 167, so as to override the right of all subjects in the Presidency Towns to be tried in Her Majesty's Court by Judge and jury; and to assume that we have power to argue on the finding, or to take upon ourselves the power of a jury, is a proposition to which I cannot accede, for I do not think that when that section was drawn, it was intended to give, or that it does in fact give, this Court power to exercise the functions of a jury. My learned colleagues are in substance retrying the case, omitting the piece of evidence which this Court unanimously

1872. holds to be inadmissible. I record my strenuous protest against
 REG. assuming such a power to ourselves. The section is inap-
 v. plicable to trial by jury in the Presidency Towns, and was never,
 NAVROJI DA'DA'BHAI. in my opinion, intended to alter the constitution or vary the
 powers of this Court which, sitting as we here are, is a Court
 for deciding difficult points of law reserved for its considera-
 tion. The term 'decision' is inapplicable to a trial by Judge
 and jury. It cannot be the 'decision' of the Court, for the
 Court has no power to ascribe guilt or innocence to the
 prisoner. What 'decision' has there been here? The verdict
 of the jury is part only of the process by which the prisoner
 is sentenced by the Judge, but is not a 'decision.' The 'deci-
 sion' of a case is not with the jury. I consider that section
 to be wholly inapplicable to the present case. For these
 reasons I am of opinion that the conviction and sentence
 should be quashed.

GREEN, J. :—The questions before this Court for decision
 are (1) whether the document, which was admitted in evi-
 dence at the trial and marked as Exhibit E was not irrele-
 vant and, therefore, inadmissible in evidence against the
 prisoners; and (2) supposing the document to have been
 inadmissible, what order this Court should make.

With regard to the first question, I may observe that at
 the time of the trial and when the document in question was
 tendered, I was of opinion that it was admissible, as it did
 not then appear to me that the signing of it by the prisoner
 Navroji Dádábháí, was caused by any inducement, threat,
 or promise within the meaning of Sec. 24 of the Indian Evi-
 dence Act, 1872. After the full discussion, however, which
 the evidence bearing on this question has received on the
 present occasion, and having regard to the clearer view of
 the exact sequence of events on the day when that
 document was signed, which that discussion has afforded
 to me, I am now of opinion that the document ought
 to have been deemed inadmissible under the section
 of the Act above referred to. On the first question, there-
 fore, I agree with my learned colleagues that Exhibit E was
 not admissible in evidence.

The second question depends on the construction to be put on Clauses 26 and 38 of the Letters Patent of the 28th December 1865, and on Sec. 167 of the Indian Evidence Act 1872.

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In construing Clause 26 of the Letters Patent, I agree that under Clause 38, we are to have regard to the procedure and practice in criminal cases of the late Supreme Court, and this, in substance and speaking generally and so far as it had not been varied by any legislative enactments applying to India, was the procedure and practice of Courts of Oyer and Terminer and Gaol Delivery in England. The only remedy of a person alleging himself to be aggrieved by a conviction or sentence of the late Supreme Court, sitting as a Court of Oyer and Terminer, was by appeal to the Queen in Council, where the Supreme Court thought fit to allow such appeal. The Letters Patent of 1823, constituting the late Supreme Court, are silent as to any power of that Court, sitting as a Court of Oyer and Terminer and Gaol Delivery, to reserve any points which might have arisen in the course of a criminal trial, or of that Court, sitting in any other capacity, to entertain and deal with any such reserved points. The Letters Patent, however, gave, as I have said, a general right to appeal to the King in Council in all criminal cases where the Supreme Court thought fit to allow the appeal, and, in case of capital sentences, gave the Court power, when a proper occasion appeared to such Court to exist for an exercise of mercy, to suspend the execution of such capital sentence till the royal pleasure should be known. There was, however, under the Charter of the Supreme Court, no such power, as is contained in Clauses 25 and 26 of the Letters Patent of 1865, to reserve for the opinion of the Court a point or points of law, and for such last mentioned Court to dispose of the same.

In the case commonly called the *Bhattia Conspiracy Case*, tried at the December Criminal Sessions 1861 of the late Supreme Court of Bombay, to which my brother Bayley has referred (and in which I had the honour to appear as junior counsel with him for the defence), there was no case reserved

1872. for another Court. After the verdict was delivered, the
 REG. defendant's counsel asked that sentence might not be pro-
 v. nounced and that an opportunity might be afforded of
 NAVROJI moving in arrest of judgment or for a new trial. On the
 DA'DA'BHAI. following day, Sir Mathew Sausse, the Chief Justice, sat
 as assessor to hear the motion with Sir Joseph Arnould
 who had presided at the trial. It was still an adjourned
 sitting of the Court as a Court of Oyer and Terminer and Gaol
 Delivery, and not of the Supreme Court exercising the powers
 of the Court of Queen's Bench in England; and for this reason,
 the Judges held that the motion for a new trial could not be
 entertained by them, as they were not sitting in exercise
 of the powers of the Court of Queen's Bench to grant a new
 trial. The motion however to arrest judgment, was made on
 the ground that the indictment did not disclose any criminal
 offence at all, and this was disposed of by the Court. I have
 looked through all the volumes of reports of cases decided by
 the late Supreme Courts here and at Calcutta which are
 accessible to me, and though I find a number of instances of
 motions in arrest of judgment and motions for new trial in
 cases of misdemeanour and in cases where, before sentence, a
 doubt had been entertained as to jurisdiction, and the point has
 been argued before two or more Judges, as assessors, with
 a view to recommending the prisoner to the mercy of the
 Crown, I have not been able to come upon any instance of a
 point, arising in a criminal case, having been reserved for the
 opinion of the Court in any way analogous to that provided
 by Act 11 & 12 Vict., c. 78, in England. I am still of the
 opinion, which I ventured to express at the argument of
 this case, that no practice of reserving points arising in
 criminal trials existed in the time of the Supreme Court, and
 that the only practice, which could be any guide to us, (apart,
 of course, from the provisions in Clauses 26 and 38 of the
 Letters Patent), was that which prevailed in England
 independently of Act 11 & 12 Vict., c. 78.

Had the words of Cl. 26 of the Letters Patent been identical with those of Section 2 of Act 11 & 12 Vict., c. 78, I agree that regard should be had to the course which would

have been pursued by the Court for Crown Cases Reserved in disposing of a case like the present. But in the first place, no authority has been cited at the bar, nor am I aware of any, in which a question like the present has been dealt with by that Court; and in the second place, the language of cl. 26 differs, in an important point, from that of Section 2 of the Act. Section 2 of the Act, after providing for the statement in a case signed by the Judge who presided at the trial, of the question or questions of law reserved and the transmission of such case, provides that the Justices and Barons "shall thereupon have full power and authority to hear and finally determine the said question or questions and thereupon to reverse, affirm, or amend any judgment, which shall have been given, &c., or to avoid such judgment &c., &c., or to make such other order as justice may require," &c. The 26th clause of the Charter provides that where a point or points of law shall have been reserved for the opinion of the High Court by a Court of Original Criminal Jurisdiction, "the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." There is nothing in Sec. 2 of the Act like the words "review the case or such part of it as may be necessary." On the other hand, there is no provision in the Letters Patent for any "case" to be stated by the Court of Original Criminal Jurisdiction, and the word "case" occurs in this 26th clause for the first and only time. I am not disposed to hold that by these words, it was intended to give this Court any general power of interfering with the verdict of a jury in a criminal case, or of entertaining anything in the nature of an appeal from it. It is clear, however, that power is given to the Court to interfere with a verdict, and the judgment thereon, in the sense of setting it aside. An appeal consists, in general, in the reconsideration by another Court of the decision of a Court

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of first instance or intermediate Court of appeal on the same materials as were before the Court whose decision is under reconsideration. But when the verdict of a jury has been given on evidence some portion of which was not properly admissible, and when a Court, in considering a point of law reserved as to the admissibility of such last mentioned portion of evidence, entertains the consideration of the question whether, excluding the evidence, as to the admissibility of which there is a question, the verdict is still clearly sustainable, the last mentioned Court is not hearing an *appeal* from the verdict of the jury, for the reason that that Court considers the decision, not on the same materials, namely, the whole evidence which was before the jury, but on part only of those materials, namely, the evidence less the inadmissible portion. For this reason, I consider that for this Court to take such a course is not open to the objection that the verdict of a jury in a criminal matter and the judgment and sentence thereon of this Court, sitting as a Court of Original Criminal Jurisdiction, are not the subject of an appeal to this Court sitting in another capacity. In my opinion, this 26th clause gives this Court power of reviewing, that is, reconsidering, the *case* (by which I can only understand, the pleadings, proceedings, and evidence) so far as may be necessary for the purposes afterwards mentioned in the clause, namely, the final determination of the point or points of law, and that being determined, so far as may be necessary for the purpose of altering the sentence (as for instance, if an illegal sentence has been passed), and of passing such judgment and sentence as to the Court shall seem meet. In some cases, as for instance where the question is of altering a sentence and passing a new sentence, this Court must of necessity look at the evidence in order to determine what sentence ought to be awarded. I should not, indeed, be disposed, unless necessitated to do so, to put an interpretation on this clause inconsistent with the procedure and practice in criminal cases of the late Supreme Court. But I do not find any necessity to do so, so far as regards the present case,

if such procedure and practice is to be deemed to be that, in use in England before the passing of Act 11 & 12 Vict., c. 78. The three cases cited by Sir W. M. Russell at p. 213 of the 3rd volume of his Treatise on Crimes and Misdemeanours, of *Rex v. Tinkler*, *Rex v. Oldroyd*, and *Rex v. Ball* have, so far as I can see, never been overruled. Lord Denman seems to have doubted the doctrine laid down in *Rex v. Ball*. But the doctrine there laid down was assented to by all the Judges present, and a doctrine, so laid down, is not, as it seems to me, to be got rid of by a MS. *quære* made for private purposes by another Judge however eminent. Lord Denman also remarks that the statement of the case of *Rex v. Tinkler* in note (F) to the report of *Rex v. Ball* is not quite correct. But this note (F) is one by the editors, Messrs. Russell and Ryan, and there is nothing in the report to show that the Judges, who laid down the doctrine in *Rex v. Ball*, were misled by, or relied upon, this alleged incorrect statement of the case of *Rex v. Tinkler*, or even had any statement, correct or incorrect, of that case before them at all. Whether the facts in the case of *Rex v. Tinkler*, on which the doctrine reported to have been laid by the Judges in that case, were correctly or incorrectly stated, it is not alleged that the doctrine laid down was incorrectly reported, and I am not aware of any decision which overrules the doctrine so laid down which was in 1781, or which was laid down in the two later cases *Rex v. Oldroyd* (in 1805) and *Rex v. Ball* (in 1807), and I venture to express the opinion that the doctrine there laid down is a safe and reasonable one.

In the present case, however, it is not necessary to go so far as the doctrine laid down in *Rex v. Ball* would, perhaps, warrant, and to hold that the Court, disposing of a point or points of law reserved, if it considers that any evidence tendered on the part of the prosecution on one head of charge has been improperly admitted by the Judge trying the case, has power to look at the evidence in support of that head of charge, against the admission of which no exception can be taken, and say whether on that alone, the con

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viction on that head of charge can be sustained. The present case is not the case of a single offence charged. The prisoner was convicted on the second head of charge of committing criminal breach of trust as a clerk on the 2nd July 1872 as to a sum of Rs. 729-6-9, and on the fifth head of charge, of the same offence on the 5th July 1872 as to a sum of Rs. 826-8-0. The evidence improperly admitted, as having been procured by threat or inducement, was an acknowledgment, given by the prisoner under his hand on the 11th July 1872, that he had, on the 5th July 1872, received from one Mádhavráo the sum of Rs. 826-8-0. How this piece of evidence can be supposed to have had the slightest influence on any reasonable being as tending to show that the prisoner, on the 2nd July 1872, committed criminal breach of trust of a sum of Rs. 729-6-9, I am wholly at a loss to conceive. When the Legislature allowed several counts to be contained in one indictment (or what is the same thing, several heads of charge in one charge) relating to different offences, it must be supposed to have given juries credit for sufficient intelligence to distribute the evidence, given on the part of the prosecution, to the respective offences charged to which that evidence was, in logic and common sense, applicable. It was argued in the present case that the admission of the receipt in question in evidence supplied evidence of a dishonest intent and so might have had an effect on the minds of the jury with regard to the sum of Rs. 729-6-9 misappropriated three days before. I am unable to agree to this. The receipt is simply what I have stated and nothing more, viz., an admission of the receipt, on the 5th July 1872, of a sum of Rs. 826-8-0, and does not, in any way, involve an admission of having misappropriated that money or any money. The receipt of this sum was, no doubt, a fact necessary to be proved before the prisoner could be convicted on the fifth head of charge, and the document in question materially corroborated the other evidence there was of the fact of this receipt, but does not show, or tend to show, any dishonest intent so far as regards either that sum or the sum of Rs. 729-6-9, as

the receiving the money by the prisoner and his written acknowledgment were both occurrences in the ordinary and proper discharge of his duty. Even admitting, as a general principle (though to do so would seem to be a contravention of Sec. 167 of the Indian Evidence Act of the present year), that the Court, considering the point reserved, ought not to attempt to estimate what effect the admission of a piece of irrelevant evidence may have had on the minds of a jury with regard to a charge to which such evidence is admitted as being applicable, or to regard itself as competent to pronounce that the evidence could have had no effect, the principle must, I think, be limited to the case where a single offence is charged. Where different offences are allowed to be charged against a prisoner in one indictment or instrument of charge, a case may easily be supposed where evidence has been laid before the jury during the trial, wholly irrelevant to the charge of which they convict the prisoner, and yet that the fact of such evidence having been before the jury would furnish no ground for setting aside the conviction. For instance, if a prisoner be charged with two different offences under several heads and be acquitted as to one and convicted as to another, he would not be heard to argue that the conviction as to the latter ought to be set aside because evidence, relevant perhaps to the offence of which he had been acquitted, but irrelevant to the offence of which he had been convicted, had been laid before the jury, and that it was impossible to say what influence such evidence, irrelevant, as it was, to the offence of which he had been convicted, might have had on the minds of the jury in convicting him of that offence.

But any doubt which might have existed on the question as to the validity of this conviction is, in my opinion, set at rest by Section 167 of the Indian Evidence Act of 1872, applying, as it does, as well to the High Court sitting as a Court of Original Criminal Jurisdiction as to this Court sitting for the consideration of a reserved point. It seems clear to me that to set aside the judgment and sentence in this case founded on the verdict of the jury, would be to reverse

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1872. a decision within the section last referred to, and this, by
 REG. the same section, the Court is not to do, if it shall appear
 v. that independently of the evidence improperly admitted,
 NAVROJI there was sufficient evidence to justify the decision.
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For these reasons, I concur with the Chief Justice in the opinion that the judgment and sentence be affirmed.

[ORIGINAL CIVIL JURISDICTION.]

Appeal No. 210.

Suit No. 822 of 1871.

SONBA'I, widow of FAZUL HABIBHA'I, and
 another *Plaintiffs.*
 AHMEDBHA'I HABIBHA'I and another..... *Defendants.*

Procedure—Appeal to Privy Council—Interlocutory judgment—Letters Patent of High Court, Cl. 15 and 40—Intermediate appeal to High Court—Discretion—Order for Inspection of documents—Appeal from order in Chambers.

No appeal lies, under Section 40 of the Amended Letters Patent of the High Court, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, until such judgment or order has been subjected to an appeal to the High Court under Clause 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under Clause 15 is given directly to the Privy Council.

Semle—The High Court will not, in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice, such as an order for the inspection of documents.

Under Clause 15 of the Letters Patent and under the rules of the High Court, an appeal to the High Court from an interlocutory order made by one of its Judges only lies in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts.

IN the above suit and in a cross suit (No. 639 of 1871) between the same parties, Gibbs, J., sitting in Chambers, made an order, on the 9th of Sept. 1872, that the defendant, Ahmedbhái Habibbhái should “produce and give full inspection of all books of account of the late Habibbhái Ebráhim deceased and of the said Ahmedbhái Habibbhái as executor of the last

will and testament of the said Habibhái Ebráhim deceased from the year 1854 down to the time of the making of the order " and in particular of certain of the said accounts.

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From this order, *Marriott*, on behalf of the defendant, Ahmedbhái Habibhái, on notice of motion given to the plaintiff, moved, on the 28th of September 1872, before Sargent, Acting C.J., and Bayley and Green, JJ., for leave to appeal to the Privy Council.

Marriott :—The present motion is made for leave to appeal to the Privy Council under Clause 40 of the Letters Patent, which gives this Court a discretion to grant permission to any party to a suit to appeal to the Privy Council from "any preliminary or interlocutory judgment, decree, order, or sentence of the High Court," and the first question to be decided is whether the order of Mr. Justice Gibbs of the 9th of September comes within the meaning of that clause. An appeal in this case to the Privy Council, instead of to the High Court, is rendered necessary by Section 363 of the Civil Procedure Code which, except in certain specified cases, enacts that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree unless and until the decree itself is appealed from. The latter proviso is nugatory in a case like the present, where the order will have been enforced long before a decree can be made in the suit. The clause in the Charter seems to have been inserted with a view to such a case as the present and the widest possible words are used in it. (Sargent, J. : Is there not an appeal to this Court from the order in question under Clause 15 ? Can the provisions of the Code override that clause ?) The practice of the Court has generally been understood as not allowing of such an appeal, but if the Court should consider that such an appeal does lie, the present motion would not be insisted on. The question has been considered in the case of *DeSouza v. Coles* (a), but there the difficulty caused by Section 363 did not arise, because Section 36 of the Code allows an appeal in the case of the rejection of a plaint.

(a) 3 Mad. H. C. Rep. 384.

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Anstey, contra :—I contend that this order does not fall within the meaning of Clause 40 of the Letters Patent. An order to be appealable must have some definitive and final effect—must decide some question of right between the parties. He cited upon this point *Johnston v. The East India Company* (b), *The East India Company v. Barton* (c), case of *Mahabul Singh and others* (d), *Cameron v. Fraser* (e), *Forbes v. Ameeroonissa Begum* (f), *Maharaj Moheshur v. The Government of India* (g). It is not any part of my argument to contend that an appeal lies in this case to the High Court, but it is to be remarked that Stat. 7 & 8 Vict., c. 69, s. 1, empowers the Privy Council to allow appeals from Courts of first instance without the intervention of the Lower Appellate Courts, but no such power is given to this Court; see *in re Cambridge* (h), and *in re Barnett* (i). This is a mere question of practice, and upon such questions the Privy Council and the House of Lords decline to entertain appeals: *Barry v. Butlin* (j), *Mellish v. Richardson* (k). The only exception is where the refusal to admit such an appeal will cause an absolute failure of justice as in the case of *Tronson v. Dent* (l). The appellant here has no merits and no important question is involved: *Brown v. McLaughan* (m).

SARGENT, C.J. :—We are of opinion that this motion must be refused. I think that Section 40 of the Letters Patent of 1865, only contemplates orders which have been made on appeal by the High Court, under the provisions of Clause 15 of the Letters Patent, and such orders as are by reason of the number of Judges who have taken part in the decision of them, on that account not appealable to the High Court.

The reason for my so thinking is, that to hold otherwise would lead to the conclusion that this Court might give

(b) 1 Strange's Notes of Cases 18.

(c) 1 Mor. Dig. p. 46 and note 1 at foot of same page.

(d) *Ibid* p. 55.

(e) 4 Moo. P. C. C. 1.

(f) 5 Calc. W. Rep. P. C. 47.

(g) 3 *Ibid* 45.

(h) 3 Moo. P. C. C. 175.

(i) 4 *Ibid* 453.

(j) 1 *Ibid* 98.

(k) 1 Cl. & F. 235.

(l) 8. Moo. P. C. C. 419.

(m) L. Rep. 3 P. C. 458.

leave to appeal from an interlocutory order at once to the Privy Council, although it has not power to give leave to appeal when the final judgment has been pronounced without an intermediate appeal to this Court. Such an anomaly could not, I think, have been intended. It was said that there are orders against which no appeal lies to this Court under Clause 15. If an order is of such a nature as not to warrant an appeal from it to this Court, what reason is there for thinking that it can have been intended that an appeal should be allowed to the Privy Council? I am of opinion, however, that if this were a case in which we considered that we had jurisdiction to allow an appeal to the Privy Council, it is one in which we should, in the exercise of the discretion vested in us by Clause 40, refuse to do so, as it is a well-established rule of the Privy Council not to entertain an appeal on a mere question of practice such as this order for the inspection of documents clearly is. As to whether this order is one from which an appeal lies under Clause 15 of the Letters Patent to this Court, I give no opinion.

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BAYLEY, J. :—I concur in the opinion expressed by the Chief Justice, and I do not think that by Clause 40 of the Letters Patent an appeal can be allowed to the Privy Council from an order made by a single Judge, without the High Court, in the first instance, hearing an appeal from such order and deciding upon it.

Assuming, however, that the question arises whether this Court should in this instance allow an appeal to the Privy Council, I am clearly of opinion that it should refuse to allow such an appeal. It is well stated in the opinion of the Judges delivered in the House of Lords by Mr. Baron Bayley in the case of *Mellish v. Richardson (ubi supra)* that—"the practice of the Court below is a matter which belongs by law to the exclusive jurisdiction of the Court itself, it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their judgment alone without any appeal to, or revision, by a superior court. * * * We think, therefore, that it is not competent for the superior court to examine into the

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propriety of the amendment which is left to the sole discretion of the Court by which it has been made," and in the course of the argument of this case, I referred to a case in the Privy Council, decided in June (1872), of *in re Barlow v. Orde (n)*, in which Sir Lawrence Peel observes: "Many hundreds of appeals come here. This tribunal is not supposed to know the practice of each Court." The question involved in the order sought to be appealed from, is a mere question of practice; it decides nothing as to the merits of the case, and I think that it is not such an order as that, in the exercise of a sound discretion, we ought to allow an appeal from it to be forwarded from this Court to their Lordships sitting in the Judicial Committee of the Privy Council.

Whether there be an appeal from the order of Mr. J. Gibbs to this Court itself, I do not give any opinion. The twenty days within which an appeal is allowed will not elapse until to-morrow; and the defendant, if so advised, can present an appeal to this Court, but as to whether such an appeal properly lies or not, I give no opinion. I think this motion should be refused with costs.

GREEN, J. :—I am of the same opinion. I think the Privy Council, if we allowed this appeal to go before it, would have great difficulty in ascertaining what the practice of this Court, with respect to the granting of inspection of documents, is, and what are the rules by which it should be guided in coming to a decision as to whether, according to those rules, the inspection was properly granted or not. This seems to me to be a strong ground for refusing (if we had jurisdiction in the matter) to exercise our discretion in favour of the defendant.

The motion was accordingly refused with costs.

Upon the motion being refused, Ahmebhái Habibhái filed an appeal to the High Court against the order of the 9th of September 1872. The appeal was set down for hearing on the preliminary point whether an appeal lay to the High Court from the order in question, and on the 3rd of October

1872, it was argued before Sargent, Acting C.J., and Bayley and Green, JJ. 1872.

Marriott (with him *Pigot*) for the appellant :—The case of *DeSouza v. Coles* (o) is a direct authority that orders, like the present, are appealable. The Madras Court has put the widest construction on the term “judgment” used in Clause 15 of the Letters Patent and properly so, for most important orders are made in Chambers, the disobedience of which involves the imprisonment of one of the parties to the suit, and it is only reasonable to suppose that it was intended that they should be subject to revision by an Appellate Court. The construction which this Court has already put upon Clause 40 is in favor of the view I now contend for. Such orders as the present would be open to appeal in the Courts of Equity in England, and were so in the late Supreme Court which adopted the practice of the Court of Chancery, see Cl. 41 of its Charter. The High Court will follow the same practice where it is not repugnant to the Letters Patent, see Cl. 18 of Letters Patent of 1862 and Clause 19 of Letters Patent of 1865 and Rule 1* of Ch. II. of the rules of this Court. If our construction of Clause 15 be correct and it is enacted by that clause that orders made by a single Judge, not being final judgements, should be appealable, then the rules of the Court adopting the Code of Civil Procedure as containing the rules of practice of this Court cannot take away the right of appeal expressly given by the Letters Patent. But in fact they have not that effect, for the provisions of the Code are to be applied only in so far as they are applicable.

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* NOTE.—Rule I. of ch. II. : 1.—All rules which at the time of the abolition of the Supreme Court of Judicature at Bombay were in force for regulating the practice of that Court at its Plea and Equity Sides, shall extend, so far as the same are applicable, and as nearly as may be, to all matters of Ordinary Original Civil Jurisdiction in this Court, except in such respects as the same may be contrary to the Statute 24 & 25 Victoria, Chapter 104, or to the Letters Patent continuing this Court, bearing date the 28th day of December in the twenty-ninth year of the reign of Her Majesty (A.D. 1865,) or to the rules of this Court made, or which shall hereafter be made, under and in conformity with the 37th Section of the said Letters Patent, or to the provisions of Act VIII. of 1859 and of any

1872. *Anstey* (with him *Starling*) for the respondents :—Orders for the inspection of documents are open to appeal in England because the Judges, in making such orders, are, under statute, exercising by delegation the power of the Courts to which they belong. The case is different where a single Judge exercises original powers derived from the common law and not the creatures of statute. He cited *Smeeton v. Collier* (*p*), *R. v. Faulkner* (*q*). Independently of statute, no appeal lies upon a mere question of practice: *Mellish v. Richardson* (*r*). It would be useless to admit such an appeal as the present, as, when the Court learned the nature of the order, it would refuse to enter upon the merits of it. Those orders only are appealable which go to the merits of the case and decide definitely some right between the parties: *Justices of the Peace for Calcutta v. The Oriental Gas Co. Limited* (*s*). This order concludes nothing. It is moreover discretionary: *Coleman v. Trueman* (*t*).

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Marriott, in reply—The authority of the Court to order inspection of documents is based on Sec. 6 of Act XV. of 1852.

(*p*) 1 Exch. 457. (*q*) 2 Cr. M. & R. 525. (*r*) 1 Cl. & F. 235.
(*s*) 8. Beng. L. R. 439. (*t*) 3 H. & N. 874; S. C. 28 L. J. Ex. 5.

subsequent law which has been made amending or altering the same by competent legislative authority for India, save so far as the said provisions of the said Act VIII. of 1859, and subsequent laws as aforesaid, have been or hereafter shall be, as regards this Court, duly modified by its rules which have been or hereafter shall be made as aforesaid, under and in conformity with the 37th section of the Letters Patent.

And the practice of this Court, in all matters of Ordinary Original Civil Jurisdiction aforesaid, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859, and of any subsequent law which has been made, amending or altering the same by competent legislative authority for India, except so far as such provisions have been or shall hereafter be modified by this Court under and in conformity with the said 37th section of the said Letters Patent granted by Her said Majesty in pursuance of the said Statute 24 & 25 Vic., c. 104, and the Statute 28 & 29 Vic., c. 15. Nothing hereinbefore contained shall affect Chapter XVIII. of the rules of this Court made on the 25th day of November 1867 regulating proceedings in its Admiralty and Vice-Admiralty Jurisdiction, or the procedure of this Court in its Testamentary and Intestate Jurisdiction, which, as heretofore, shall continue to be the same as that of the said Supreme Court in its like jurisdiction at the time of its abolition (1st August 1871).

Formerly a bill of discovery would have been necessary and the decree made upon such bill would have been open to appeal. This is not an order provided for by the Code of Civil Procedure, and Sec. 363 does not, therefore, apply to it.

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Cur. adv. vult.

SARGENT, Acting C.J. :—This is an appeal from an order made by Mr. Justice Gibbs on the 9th of September last, which was an order making absolute a summons requiring the defendant to produce certain documents for the inspection of the plaintiffs, and the preliminary question has been raised before us whether from such an order an appeal lies to this Court. The clause of the Letters Patent which gives the right of appeal to this court is Clause 15 which runs as follows :— “ And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court * * * and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being ; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to us, our heirs, or successors in our or their Privy Council as hereinafter provided.” Now, the construction of that section of the Letters Patent has been under consideration both in the High Court of Madras and the High Court of Calcutta, and the Madras High Court has interpreted the word “ judgment ” as meaning “ any decision or determination affecting the rights or interest of any suitor or applicant,” in fact, has put the largest possible interpretation upon the word. On the other hand, the Bengal High Court (consisting of our late Chief Justice, Sir Richard Couch, and Markby, J.), in the case of the *Justices of the Peace v. The Oriental Gas Company*

1872. *Limited (u)*, expressed an opinion that the word "judgment" must receive a more limited meaning and that it must be confined to "a decision which affects the merits of the question between the parties by determining some right or liability". Under the interpretation of the Madras High Court, the present order would apparently be appealable, but would not be so if the Calcutta High Court are right in their opinion, as this order does not in any way decide any of the merits between the parties. The question, therefore, arises—which of the above decisions will this court adopt? The conclusion I have arrived at is that the ruling of the Calcutta High Court is right and for the reasons I am about to state.

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How did the matter stand under the first Letters Patent? The 14th clause provided that an appeal should lie to the High Court from the judgment of one or more Judges of the High Court or of any Division Court, provided the decision was not made by a majority of the full number of the Judges of the High Court, which provisions are in effect the same as those contained in the 15th clause of the present Letters Patent. The same term "judgment" is used in both. Then the 37th clause provided that the proceedings in all matters coming before the High Court with certain defined exceptions in Civil suits of every description should be regulated by the Code of Civil Procedure being Act VIII. of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as were then in force.

In construing these first Letters Patent, it would be contrary to all principles laid down for the construction of statutes and charters, if we were to neglect the provisions of Clause 37 in construing Clause 15, and we must read the two so as to make them, if possible, reconcilable. Now, on referring to Section 363 of the Code of Civil Procedure, we find it enacted that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree, though, if the decree be appealed from, any error in any such order, affecting the merits of the case, may be set forth as a

ground of objection in the memorandum of appeal; and in other sections we find that some specified orders are appealable, such as injunction orders, orders rejecting plaints, orders refusing to set aside *ex parte* judgments, &c. This being so, what is the effect of the Civil Procedure Code as explaining Clause 14 of the Letters Patent. (I) Either the word "judgment" in Clause 14 must be read as being used in its more technical signification as equivalent to final decision—a view which is open to objection, for in Clause 40 we find that an appeal is given to the Privy Council from orders that are merely preliminary or interlocutory made in the High Court, which shows that some orders not being final decisions are open to appeal. Or (II) the word "judgment" may be taken to include any preliminary or interlocutory judgment, decree, order, or sentence within the meaning of Clause 40, and effect may be given to Section 37 by limiting the orders open to appeal to those orders which are expressly declared appealable in the various sections of the Civil Procedure Code, or in other words, by incorporating the provisions of the Civil Procedure Code relating to appeals with Sec. 15 of the Letters Patent, and holding the word "judgment" to mean all judgments and orders which are appealable under the provisions of the Civil Procedure Code. It is not material which view we take here. In either case this order would not have been open to appeal under the Letters Patent of 1862.

In the New Letters Patent, we do not find Clause 37 re-enacted. In lieu of it, we find a Clause (37) which gives power to the High Court to make rules and orders for the purpose of regulating all proceedings in Civil cases in the High Court in its various jurisdictions: "Provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure * * *, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India." Now, under that section, rules have been made, and in one of those rules it is laid down, that the practice of this Court in all matters of Ordinary Original Civil Jurisdiction shall be

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1872. regulated by the provisions, so far as the same are applicable,
 SONBA'I, of Act. VIII. of 1859 and of any subsequent law which
 widow of has been made amending or altering the same. The effect
 FAZUL HABIBHA'I, of that rule is that the Code has been again incorporated
 BHA'I, into the Letters Patent, and the result is the same as if
 z. AHMEDBHA'I Clause 37 of the former Letters Patent were still in force.
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It has been said that that rule only relates to matters of Ordinary Original Civil Jurisdiction and does not apply to this Court in the exercise of its Appellate Jurisdiction, but that expression was intended clearly to mean the same as the words used in the heading of the Chapter in which they are found, *i.e.*, in all matters "relating to the Civil Jurisdiction on the Original Side of the High Court." The rule was intended to have the same scope as the corresponding rule in the Calcutta Court which uses larger words and plainly embraces the case of appeals on the Original Side of the Court. For these reasons, I have come to substantially the same conclusion as the High Court at Calcutta has arrived at, though by a somewhat different process of reasoning, and am of opinion that the order of Mr. Justice Gibbs of the 9th of September last, is not appealable, and that this appeal must be dismissed.

BAYLEY, J. :—I am also of opinion that this Court has no power to hear this appeal.

It is an old rule that in construing a document every part of it must be made, if possible, to take effect, and I think that we should so construe the Letters Patent of the High Court of Bombay as to make the different provisions of them harmonize, so far as can be done, the one with the other.

By Clause 37 of the Letters Patent of 1862, it is ordained that "save as hereinbefore in this clause otherwise provided, the proceedings in civil suits of every jurisdiction between party and party shall be regulated by the Code of Civil Procedure, Act. VIII. of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as are now in force."

It was admitted during the argument that orders made in England by Judges in Chambers are subject to be set

aside or modified by a motion to one of the superior courts at Westminster for that purpose; also that orders by an Equity Judge in chambers are open to appeal. I do not think, however, that the practice in England affords much assistance in deciding the present question, which appears to me to rest upon the proper construction to be put upon the Letters Patent.

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The Act for establishing High Courts of Judicature in India, 24 & 25 Vict., c. 104, by Section 8 enacted that upon the establishment of such High Court in the Presidency of Bombay, the Supreme Court and the Court of Sadr Diváni Adálat, and Sadr Foujdári Adálat, in the same Presidency should be abolished.

The Letters Patent not only erected and established a perfectly new court on the ruins of the old one, but declared that the procedure to be followed in civil suits was that prescribed by the Code of Civil Procedure—a code which, though some difficulty was at first experienced in working it, is, I venture to think, on the whole a vast improvement upon the tedious and complicated systems of Common Law and Equity Pleadings which prevailed in the Supreme Court.

The framers of the Letters Patent of 1862 must be taken to have been fully cognizant of the provisions of the Code of Civil Procedure.

The appellant relies upon Cl. 15 of the Letters Patent of 1865 which corresponds with Cl. 14 in the Letters Patent of 1862, and in each clause an appeal is given “from the judgment of one Judge.”

In Clauses 39 and 40, regulating appeals to the Privy Council, the words used are “judgment, decree or order.”

Now, one would hardly speak of an order of a Judge in chambers granting an inspection of books or documents as a “judgment.” Is there reason for supposing that the marked difference between the words in Cl. 15 and those in Clauses 39 and 40, was intentional, and that the right of appeal from a Judge in chambers was and is of a limited, and

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not of a general, character? The Code of Civil Procedure itself seems to afford some explanation.

The word "judgment" in the Code is, in Sec. 183 and the following sections, used to denote the decision which the court is to pronounce after the exhibits have been perused and the parties heard in person or by their respective pleaders. Appeals from orders are regulated by Secs. 363 to 366 of the Code, the first of which enacts that "no appeal shall lie from an order passed in the course of a suit and relating thereto prior to decree." That provision must of course be read in connection with, and as subordinate to, other sections of the Code in which appeals are expressly given from orders, such, for instance, as Sec. 36 which provides that when a plaint is rejected under any of the sections previous to it, an appeal shall lie from the order rejecting the plaint; Section 76 where an appeal is given to a defendant who has been ordered to give bail; Sec. 85 where an appeal is given to a defendant against an order for an attachment before judgment made under Sec. 84; Sec. 94 where an appeal is given to a defendant against an order made for an injunction or receiver under Sec. 92 or 93; Sec. 119 where an appeal is given against an order rejecting an application to set aside an *ex parte* judgment.

Bearing these provisions of the Code of Civil Procedure Act in view, I think that it was not intended that the word "judgment" in Cl. 14 of the first and Cl. 15 of the Amended Letters Patent should have the extended meaning which the Judges of the High Court at Madras in *DeSouza v. Coles* (v) have ascribed to it. If it had been deemed expedient to give an appeal from an order of a Judge in chambers, the word "order," or some words to override the provisions of Sec. 363 of the Code that "no appeal shall lie from an order passed in the course of a suit and relating thereto prior to decree," would, I think, have been inserted in Cl. 14 of the first and Cl. 15 of the Amended Letters Patent.

The present practice of this side of the High Court is regulated by the general rules passed by the Judges on the

1st August 1871, which provide that "the practice of this court in all matters of Ordinary Original Civil Jurisdiction, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859 and of any subsequent law which has been made amending or altering the same by competent legislative authority for India;" and the section of the new Letters Patent (Sec. 37), under which those rules were made, ordains that "it shall be lawful for the said High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating all proceedings in Civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-admiralty, Testamentary, Intestate, and Matrimonial Jurisdictions respectively: Provided always, that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No. VIII. of 1859, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India."

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The conclusion at which I have arrived is borne out by the decision of Sir Richard Couch, C.J., and Mr. Justice Markby on the 12th March 1872, in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited (w)*, where, after citing the cases of appeals from single Judges of the High Court at Calcutta, the Chief Justice says (x): "These are the only cases we have been able to find in which the right of appeal on this side of the Court has been discussed; and in every case it has been determined with reference to the provisions of the Code of Civil Procedure. This seems to us to be a reasonable course. For though the Code of Civil Procedure was not by the second Charter made absolutely binding on this court, it was clearly expected that so far as possible it would be adopted by it, and, as before pointed out, this has been done."

On the whole, therefore, I am of opinion that an order of a Judge in chambers, ordering the production of books and pa-

(w) 8 Beng. L. Rep. 433.

(x) Ibid 454.

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pers, is not a "judgment" within the true meaning of Cl. 15 of the Amended Letters Patent; and consequently that there is no appeal to this court from the order made by Mr. Justice Gibbs in this case, and that we have no alternative, but to dismiss this appeal and with costs.

GREEN, J. :—I concur in thinking this order not to be appealable. During the course of the arguments, I felt some difficulty and doubt and for two reasons. I.—Because many important orders are made before decree; amongst others, orders indirectly involving the imprisonment of the party disobeying them, which, though not directly orders touching the liberty of the subject, yet in effect are so, for though the order directing the actual imprisonment of a party for disobedience of a former order is itself open to appeal, yet upon such appeal I apprehend that the only inquiry would be—had the former order been made and had the party disobeyed it; and it would not be competent for the Appellate Court to consider whether the former order was correctly made or not. II.—My second doubt was founded on the wording of the rule of the 1st of August 1871, which seemed to contemplate laying down the practice of this Court in its Original and not in its Appellate Jurisdiction. These doubts I have been able to surmount, for, on reconsideration, I think that the rule in question may fairly be held to apply to the Appellate Jurisdiction of this Court on its Original side, and the Civil Procedure Code does in fact provide an appeal in the case of the more important class of orders, and I should have felt great difficulty in holding that the word "judgment" includes all orders of every description—an interpretation which is certainly opposed to its more generally received acceptation. The invariable practice too of this court for nearly ten years has been opposed to the construction of Clause 15 of the Letters Patent contended for by the appellant. No case has been cited to us in which an appeal from an order in chambers has been entertained, when such is not provided for by the Code. I concur in thinking that this appeal ought to be dismissed.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

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March 12.*Special Appeal No. 424 of 1871.*

NA'RA'YAN SADA'NAND BA'VA' *Appellant.*
 BA'LKRISHNA SHIDHESHVAR and others... *Respondents.*

*Dahi hándi ceremony—Sut to establish exclusive right to break a curd pot—
 Infringement of such a right—Damages.*

Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a particular part of the temple of Shri Vithobá and Tukárám at Dehu:—

It was held that the defendants breaking their own curd-pot on that day in any part of that temple, was a violation of that right entitling the plaintiff to damages.

THIS was a special appeal from the decision of Satyendra-Nath Tagore, Assistant Judge of Poona, amending the decree of the Munsif of Poona.

The plaintiff, the representative of the elder branch of the family of the celebrated Tukárám, brought a suit against 17 members of his family to establish his exclusive right to perform the ceremonial of breaking a curd pot in the precincts of the temple of Shri Vithobá and Tukárám at Dehu, on Fálgun Vadya the 7th of each year. He alleged that in the year 1867 the defendants broke a curd-pot of their own on the same day in the same place, and thereby deprived the plaintiff of the benefit of a donation of Rs. 5,000 which one Kalliánji Shivji intended to make, but did not make in consequence of the defendants' wrongful act.

The defendants denied the plaintiff's exclusive right as claimed, and alleged that their act of breaking their own pot was not an interference with the plaintiff's right if any, and contended that the damages claimed by the plaintiff were excessive.

The Munsif awarded the claim, but the Assistant Judge, in appeal preferred by some of the defendants, held that the defendants' act was not tortious and that the damages claimed were too remote. He, therefore, reversed the Mun-

*dissenting
 from - in
 I. L. R. 2
 Bom. l.c.
 p. 478.*

1872. *sif's* decree against the defendants, who appealed to him and
 NA'RA'YAN awarded nominal damages to the extent of Rs. 50 against those
 SADA'NAND who had not appealed.
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 BA'KRISHNA The special appeal was heard before LLOYD and KEMBALL,
 SHIDHESH- JJ.
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Vishvanáth Náráyan Mandlik for the appellants :—A decree of a competent court has already declared the plaintiff exclusively entitled to the management of the Dehu temple and its revenues, and this particular privilege of breaking a pot of curds is expressly included in the award. Some of the defendants have admitted positive interference on their part with the plaintiff's right. But active obstruction need not have been used ; because the mere fact of the defendants' breaking their own pot is sufficient to constitute a violation of the plaintiff's right. The damages claimed are not remote : *Sedgewick on Damages* pp. 85, 96, 97, 105, 112 and 118. ; *Lynch v. Knight (a)*.

Bahiravnáth Mangesh for the respondent :—As to the decree referred to, it has not been shown that the defendants were parties or privies to it, nor is it proved that the defendants broke any pot of the plaintiff's. They broke a pot of their own in a place different from the plaintiff's though near it, and that is not any interference with the plaintiff's alleged right. The damages claimed are too remote.

Cur. adv. vult.

PER CURIAM :—In this case the plaintiff, claiming to himself the exclusive right to perform all the different duties connected with the Sawasthán of Shri Vithobá and Tuká-rám Bává in the village of Dehu, among which is the ceremony of breaking annually, on Fálgun Vadya 7th, the *dahi handi* or earthen pot containing curds, alleged that on that particular day in Shake 1788 (the 28th March 1867) the defendants, 17 in number and all members of his family, prevented his performing this last named ceremonial and thereby deprived him of a sum of Rs. 5,000 which one Kallíanji

Shivji, whom the Munsiff speaks of "as the well-known railway contractor whose munificence is known throughout India," would have presented to the plaintiff, on that occasion, in order, as Kalliánji deposes, "that my charity may be known," had he (plaintiff) broken his pot, and special damages to the amount of Rs. 5,000 were claimed.

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The Munsif found that 8 of the defendants did interfere with the plaintiff's right of breaking the pot by breaking one themselves, and that therefore the plaintiff was entitled, as against them, to recover the full sum claimed. Against this decree two of the 8 defendants appealed, contending that they had not prevented the plaintiff breaking his own pot and that the damages had been extravagantly laid for the purpose of injuring them; and the Assistant Judge, finding that the appellants had not broken the plaintiff's pot, but only one of their own, held that this did not constitute a tortious act, and therefore, so far as the appellants were concerned, reversed the Munsiff's decree, remarking that if he had found in the plaintiff's favour on the question of tort or no tort, he considered the damages awarded were excessive, as the damage proved was "too remote from the cause of action." The Assistant Judge then, being of opinion that the plaintiff was "only entitled to nominal damages if any," modified the decree on the authority of Section 337 of the Code of Civil Procedure against those defendants who had been found liable in damages, but had not appealed, and awarded the plaintiff Rs. 50 with proportionate costs.

The special appellant now presents, for our consideration, three main points, 1st, that the Assistant Judge misconstrued the admissions of Rámchandra and Rámkrishna (against whom the Munsiff's decree was reversed) in holding that they did not prove that they had positively obstructed the plaintiff in the exercise of his right; 2nd, that if there was no positive obstruction, still the act of the eight defendants in breaking their own pot was an infringement of his (plaintiff's) right; and 3rd, that the special damages claimed were the direct and immediate result of the said tortious act.

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As regards the facts of the case, we think that we may, for the purposes of this appeal, take it as sufficiently established that the exclusive right to perform the *dahi hāndi* ceremony was in the plaintiff and that on the occasion in question the defendants, in respect of whom this appeal is preferred, did break their own pot, albeit they did not in fact prevent the plaintiff from breaking his. The Assistant Judge seems to have supposed that the wrong complained of was the breaking of the plaintiff's pot by the defendants, and therefore to have considered the appellants before him in no way liable ; but there was no such allegation in the plaint. It has not been seriously contended in argument, nor indeed does it appear to us, that there would be any foundation for such a contention that the defendants positively prevented the plaintiff from breaking his pot. We have, therefore, to determine whether there has been such a violation of the plaintiff's right as to entitle him to damages, and if so, whether the damages claimed were, as is alleged, the direct and immediate result of that wrong. As to the first question we think there can be no room for doubt that the act of the defendants, as found proved, was injurious to the plaintiff and occasioned immediate and necessary loss. The respondents contended that they did not violate the plaintiff's right because the ceremony was always performed in front of the " Garud-pār, " a stand whereon rests the image of the eagle, whereas they broke their pot before Tukārām Bāvā's image. But this seems to us a mere evasion of the truth ; both the images are within the sacred precincts of the Sawasthān and in close proximity, and there can be no doubt that the performance of the ceremony by a third person in any portion thereof was an infringement of the plaintiff's established right. With regard, however, to the second question whether the alleged loss to the plaintiff followed the defendants' act as its natural and proximate consequence, we consider that the Assistant Judge held rightly that the anticipated bounty was a matter too remote to be taken into account in ascertaining the true measure of damages. It has not been suggested, as observed by the Assistant Judge, that " to the exercise of the right of breaking the *hāndi* are attached fees or emoluments ; "

in point of fact the giving or withholding of the Rupees 5,000 rested on the arbitrary choice of a third party. It seems needless to refer to English cases in support of the proposition that the loss of the donation was not such a consequence as would flow in the ordinary course of things from the defendants' wrong; indeed the present case appears to us to be analogous to the well-known one of the midshipman who being detained on shore alleged that he had lost a lieutenantancy which he would have gained, if he had been afloat; which has frequently been quoted as an *ad absurdum* case. It is clear that the wrong would not have been followed by the alleged damage, if some facts had not intervened for which the defendants were not responsible; first, there was the act of the plaintiff in not breaking his own pot at the usual place, which may have resulted from caprice or some other cause quite unconnected with the defendants' act, and then again there was the act of the intending donor changing his mind and not giving the money.

The Court, however, thinks that, although the plaintiff failed to prove the special damages alleged, the Assistant Judge was right, as against those defendants whose liability he thought he was compelled to acquiesce in, as they had not appealed, in awarding general damages. The Court, therefore, amends the Assistant Judge's decree so far as to include in it the two defendants Rámchandra and Rámkrishna with proportionate costs throughout.

Decree amended.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 132 of 1872.

BHAGTIDA'S BHAGVA'NDA'S..... *Appellant.*
N. R. OLIVER, Manager of the Broach
branch of the New Bank of Bom-
bay, Ltd. *Respondent.*

Contract—Consideration—Mutuality—Statute of Frauds.

An agreement whereby the defendant undertook to pay to the plaintiff and two other co-creditors of an insolvent a share in any sums which he might recover from the insolvent, in consideration of receiving a share in any sums which might be recovered by the other creditors is not, though the plaintiff has passed no similar agreement in favor of the defendant, invalid for want of consideration or mutuality of obligation.

Where, however, one of the persons in whose favor the agreement was passed, without making the others parties sued the person who executed it to recover his share, *it was held* that the suit was not maintainable, as it could only be brought as a suit between partners for an account, and the result of all the partnership transactions must be brought at once under the view of the Court.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Surat, reversing the decree of the Subordinate Judge of Broach.

The facts of the case are briefly these:—

Mr. Bentley, on behalf of the Broach branch of the New Bank of Bombay, passed, on the 31st March 1869, to the plaintiff and two other creditors the following agreement:—
“There is a debt due to you by Lukmánbhái Isábhái of Broach, and there is a debt due to me by him. Claims in respect thereof have been preferred as follows:—In the Court of the Principal Sadr Amin of Surat, I have instituted a suit No. 195 in respect of a claim for Rs. 15,000, while in the Court of the Sadr Amin of Broach, you Bhagtidás have preferred a claim for Rs. 2,185. In the Court of the Munsif of Broach, you Amratlál Mohanlál have preferred a suit No. 320 for Rs. 4,008-8-0, and you Amratlál Dayábhái have instituted no suit for Rs. 1,500

due to you ; but you will file one. As regards the costs which may be incurred in all these suits, you and I are to pay the same in proportion. And as regards whatever may be realized on account of the above claims, I am to pay and receive from you the amount in proportion to my own claim. Should I make a private settlement, I am to pay and receive money according to the proportion mentioned above."

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On the same day on which this agreement was executed, namely, the 31st of March 1869, the Bank obtained a decree in their favor, which they sold for Rs. 15,000. The plaintiff Bhagtidás claimed his proportionate share from this sum with interest.

The defendant answered that the agreement was genuine, but insufficiently stamped ; that there was no consideration ; that it was incomplete, as one of the parties failed to bring his suit ; and that, as all the persons in whose favor it was passed had not presented their claims, they had violated its conditions.

The Subordinate Judge awarded the claim ; but the Judge rejected it, holding that the agreement was void for want of mutuality.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Anstey (with him *Shántarám Nárdyan* and *Chunilál Maniklál*) for the appellant :—There is consideration on the face of the agreement. It was put in by the plaintiff in evidence and was in supersession of a former one which had been torn up. A document signed by one party is not necessarily unilateral. It is quite clear that there was a mutuality of assent whatever might be said as to the want of mutuality of obligation ; but I contend that there was mutuality of obligation also, for the Bank could have recovered against the plaintiff. [*Sugden's Vendors and Purchasers* pp. 130 and 131 (14th edn.) ; *Fry on Specific Performance* pp. 134-136.] Even if there be no written agreement, a suit could be brought on a verbal one.

Pigot, for the respondent :—In case of executory contracts, mutuality of assent is not enough. There must

1872. be mutuality of obligation : Chitty on Contracts p. 14 ; *East*
 BHAGTIDA'S *London Water-works v. Bailey* (a). The decree obtained by
 BHAGVA'N- the Bank was on the same day that their Agent passed the
 DA'S agreement in question. It could not have been intended
 v. that the other parties should recover notwithstanding that
 N. B. OLIVER. they have done nothing at all. The other parties to the
 agreement are not before the Court and no decree can be
 made in their absence : *Chanter v. Leese* (b).

Shántáram in reply :—The plaintiff did not undertake to prosecute his suit to a decree. The agreement itself allowed a settlement to be effected. All that was required by the agreement was that a common cause should be made to recover as much as possible from the insolvent.

MELVILL, J :—The parties to this suit are creditors of an insolvent Lukmánbhái, and the action is brought to recover a share in a sum of Rs. 15,000 realised by the defendant by the sale of a decree which he had obtained against Lukmánbhái. The plaintiff supported his claim by a document, Exhibit No. 3, by which the defendant agreed to pay to the plaintiff and two other creditors a share in any sums which he might recover from the insolvent, in consideration of receiving a share in any sums which might be recovered by the other three creditors.

The grounds for the District Judge's judgment are stated in the following passage :—

“ In this case the consideration for appellant's (defendant's) promise to share sums recovered was the obligation by the plaintiff and the others to do the same ; but they neither passed a counter-agreement to him nor signed the agreement now sued on ; as the defendant has recovered first from the insolvent, the plaintiff has brought his action, and, if he got a decision in his favour now, the defendant might subsequently claim a share in any amount recovered by him, on the ground of his having recovered on the agreement ; but had the plaintiff been the first to recover, the defendant would have had no proof that the plaintiff had engaged to

(a) 4 Bing. 283.

(b) 4 M. & W. 295.

be bound by the agreement, on which to make his claim. I find that the present action cannot be sustained by the agreement from want of mutuality."

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We are of opinion that the judgment cannot be sustained on the grounds on which the Court below has rested it. The cases cited by the District Judge from English text-books turn upon the Statute of Frauds, which requires, in the case of certain agreements, that there should be a memorandum or note thereof in writing signed by the party to be charged or some other person by him lawfully authorized. The judgment of Lord Ellenborough in *Wain v. Warlters* (c), laid down that, in consequence of the introduction into the Statute of the word "agreement," the consideration, as well as the promise, must appear in writing. In the case, therefore, of an agreement falling within the operation of the Statute of Frauds, the agreement would be *nudum pactum*, unless the consideration were expressed on the face of the agreement. This, rather than the want of mutuality, appears to be really the ground of the decisions in the cases referred to by the District Judge. On the face of the agreement now sued upon, there is a consideration clearly expressed, so that, even if the Statute of Frauds applied, which, of course, it does not, there could be no objection to the agreement on the ground of want of consideration. Then, as regards the question of want of mutuality, it will be found that in the English cases this question also has been decided chiefly with reference to the Statute of Frauds. In *Laythoarp v. Bryant* (d), the defendant had purchased certain premises, and had signed a memorandum of the purchase, and it was argued that he was not bound because the memorandum was not signed by the vendor. Tindal, C.J., observed: "Then it is said, unless the plaintiff signs, there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant. . . And the whole object of the Legislature is answered when we put this construction on the statute. Here, when this party who

(c) 5 East 10.

(d) 2 Bing. N.C. 735.

1872. has signed is the party to be charged, he can not be subject to any fraud. And there has been a little confusion in the argument between the *consideration* of an agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature." The authority of this case would be strongly opposed to the view taken by the District Judge, even if the question had to be argued on the basis of the Statute of Frauds. But in fact there is no law in the mofussil which requires such an agreement as that here sued upon to be signed or to be reduced into writing. In order that the plaintiff and the other parties to the agreement might be bound to the defendant, it was not necessary that they should, as the District Judge says, pass a counter-agreement to him (in writing) or sign the agreement now sued on. Exhibit No. 3 is only evidence but it is not the only evidence of the agreement. If the defendant had had to sue the plaintiff, it cannot be said that the defendant would have had no proof, because he held no written promise. He could have proved the plaintiff's obligation by verbal evidence and by compelling the production of Exhibit No. 3. It cannot be said there was want of mutuality merely because the plaintiff took care to secure stronger proof of the contract than the defendant.

But, while differing from the view taken by the District Judge, we think that his decree may be sustained on another ground.

The only construction of which Exhibit No. 3 appears to us to be susceptible is this: The four persons named therein agreed to their joint interests in regard to their claims against the insolvent. Those who had already filed suits were to prosecute them to a conclusion, while one who had not already instituted a suit was to do so. They were to share the costs and divide the profits of all the suits. The transaction was of the nature of a partnership in the four suits, and the intention must have been that the proceeds of the

four suits should be brought into hotchpot and divided. That seems to us to be the meaning of that portion of the defendant's written statement in which he says: "The parties to the document have violated the terms of the agreement. They have as yet obtained no decrees declaring the debts due to them to be valid. The claim, therefore, can not be maintained." In his memorandum of appeal the defendant raised the same question, and also objected to the non-joinder of the other parties to the agreement. We are of opinion that these objections constitute a good defence. It appears that the defendant obtained his decree on the very day on which Exhibit No. 3 was signed; and it can not be supposed that he intended to give the other creditors the benefit of this decree without receiving a corresponding benefit in return. It is not alleged that the plaintiff or the other two creditors have prosecuted their suits to execution, and no reason is given for their not having done so. No doubt they may have a good reason. The whole of the insolvent's property may have been seized by other creditors, and an abandonment of hopeless suits might be wise, though it could hardly be justified without showing the consent of the defendant who had an interest in the result. But, however this may be, this suit could only be brought as a suit between partners for an account, all the partners being made parties, and the results of all the partnership transactions being brought at once under the view of the court. In its present form, we think that the suit cannot be maintained, and, on this ground, we confirm the decree with costs.

Decree Confirmed.

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Oct. 8.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 180 of 1872.

VISHVANA'THRA'V KACHESVAR*Appellant.*

NA'RA'YAN bin GOPA'L KHAPE.....*Respondent.*

*Bombay Act V. of 1864—Limitation—Act XIV. of 1859, Sec. 1, Cl. 7—
Act XVI. of 1838.*

A brought a suit in a Mámlatdár's Court, under Bombay Act V. of 1864, to recover possession of certain land from B. C joined in the proceedings *proprio motu*, and the Mámlatdár, on the 1st May 1865, made an order, awarding possession of the land to C. In an action brought by A against C in the Civil Court on the 18th October 1869, C pleaded limitation under Sec. 1, Cl. 7, Act XIV. of 1859,* as the action was not filed within three years of the Mámlatdár's order.

Held that the action was not barred by limitation, as C was not properly a defendant in the Mámlatdár's Court, and that, therefore, the Mámlatdár had no power to make an order regarding him.

THIS was a Special Appeal from the decision of R. F. Mac-tier, District Judge of Satara, in Appeal No. 27 of 1871, confirming the decree of Amrit Shripat, Subordinate Judge of Kurrar.

The plaintiff, Náráyan Khape, sued to establish his right to, and to recover possession of, some land called "kuran" (Survey No. 197). He alleged in the plaint that the land was his ancestral property, and had been in his occupation up to the 28th March 1865; and that on that day his possession was disturbed and he was ousted.

Before instituting the present action in the Civil Court, Náráyan had brought a summary suit in the Mámlatdár's Court against Bayáji, Devji, and six others, to recover possession of the land in dispute, under Bombay Act V. of 1864. In that suit, Vishvanáthráv joined *proprio motu*, though he was not made a defendant by Náráyan. On the 1st May 1865, the Mámlatdár made an order awarding possession to Vishvanáthráv. The plaint in the present action was filed on the 18th October 1869.

* The provision in the Limitation Act 1871 is the same.

The defendant, Vishvanáthráv, pleaded that he was the Inámdár and proprietor of the land in dispute, and that the claim was barred by limitation. The other defendants, Bayáji and Devji, stated that the land belonged to Vishvanáthráv, and that the plaintiff had no claim to it. The Subordinate Judge held the claim was not barred by limitation and decreed the land to the plaintiff. In appeal (which was preferred by Vishvanáthráv alone), the District Judge affirmed the lower court's decree. He laid down the issue—does the plaintiff prove that he occupied this land as owner up to 28th March 1865, and that he was then improperly ousted by the defendants? and found that the evidence for the plaintiff showed that the plaintiff's family 'Khape,' had been in occupation of the land at the time of Adam's survey, which took place more than 45 years ago; and this being the case, it was fair to conclude that no change had since taken place in the ownership of the land, and that most certainly there was no evidence to show the reverse. The District Judge confirmed the decree of the court of first instance with costs.

Against this decision, Vishvanáthráv preferred a special appeal. The appeal was argued before Sargent, Acting C. J., and Melvill, J., on the 8th October, on the question whether the claim was barred by limitation, inasmuch as the suit was instituted beyond three years from the date of the Mámlatdár's order.

Vishvanáth Náráyan Mandlik for the appellant:—The plaintiff had brought a summary suit in the Mámlatdár's Court for recovering possession of the land in dispute. The appellant appeared in the proceedings as a party, and the Mámlatdár made an order awarding possession to him (appellant), and referring the plaintiff to the Civil Court for establishing his claim, if he had any. The Mámlatdár's order purports to have been made under Act XVI. of 1838, Sec. 1, Cl. 2, and Bombay Act V. of 1864, and is dated 1st May 1865. The present action was not filed till the 18th October 1869. The claim, therefore, is clearly barred, under Act XIV. of 1859, Sec. 1, Cl. 7.

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Vishnu Ghanashám, contra :—The possessory suit brought in the Mámlatdár's Court was not against the present appellant, but against persons who are no parties to this appeal. After the plaintiff had presented his petition to the Revenue Court, Vishvanáthráv applied to be made a party to the summary action, and the Mámlatdár allowed him to join as an objector. This was illegal. The inquiry, under Bombay Act V. of 1864, is strictly confined to matters in dispute as between the plaintiff and those whom he chooses to bring before the court as defendants. The Mámlatdár's Act has got a procedure of its own. The Civil Procedure Code has not been extended to the proceedings under that Act. The Mámlatdár, therefore, had no power to make a third person a party to the summary investigation, as might be done by a Civil Court under the provisions of Sec. 73 of Act VIII. of 1859. The Mámlatdár's decision, consequently, is not binding on the plaintiff, and the present claim, therefore, is not barred.

PER CURIAM :—We think the Mámlatdár's order cannot be regarded as binding between the present parties. The present defendant was not really a defendant then, and the Mámlatdár had no power to make an order regarding him. If the point is doubtful, it should, being a question of limitation, be given in favour of the plaintiff. We overrule the objection as to limitation.

[ORIGINAL CIVIL JURISDICTION.]

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Nov. 11.*Suit No. 322 of 1870.*

HIS HIGHNESS TUKOJI MAHA'RA'J HOLKAR ..*Plaintiff.*
 PITA'MBARDAS NA'RANJI*Defendant.*

Recognised Agent—Munim winding up firm—Civ. Proc.
Code, Sec. 17, Cl. 2.

The *munim* of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognised agent of the owner of such firm within the meaning of Section 17, Cl. 2 of the Civil Procedure Code, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up.

THIS was a suit for an account brought by His Highness Tukoji Maharáj Holkar against the defendant.

His Highness the Holkar, some time in 1864 or 1865, commenced to carry on business in Bombay under the name of Sudasew Martund and Co., but had ceased to carry on such business some years before the present suit was filed, and Sudasuk Chaturbhuj, who had been the *munim* of the firm when it was carrying on business, was, at the time when the suit was filed, engaged in getting in the assets of the firm, collecting its outstandings and generally winding up its affairs. The suit was entitled "His Highness Tukoji Maharaj Holkar residing at Indore and carrying on business in Bombay under the firm of Sudasew Martund by means of his munim Sudasuk Chaturbhuj v. Pitámbardas Náranji of Bombay, Hindu, carrying on business as a mucedum in Hornby Row, within the Fort."

Beyond the general authority that Sudasuk Chaturbhuj possessed as such *munim* he had no special power of attorney or other instrument given to him by the plaintiff, authorizing him to bring the present suit. His Highness the Holkar was, at the time when the suit was brought, residing in his own territories.

The case came on for hearing before Gibbs, J., on the 30th of September 1872, when it was admitted by Counsel for the

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defendant that if, under the circumstances, Sudasuk Chuturbhuj was a recognised agent of the plaintiff and entitled to bring the suit on his behalf, the accounts between the plaintiff's firm and the defendant must be referred to the Commissioner.

Macpherson and *Lang*, for the plaintiff, contended that Sudasuk Chuturbhuj was a recognised agent of the plaintiff within the meaning of Sec. 17, Clause 2 of the Code of Civil Procedure. They relied upon the case of *H. H. Maharaj Holkar v. Pitambar Narayan*, decided on the 22nd of September 1866, by Sir Charles Sargent, under circumstances similar to those in the present suit.

Marriott and *Latham*, for the defendant, contended that the plaintiff's firm was not carrying on business, and that therefore, Sudasuk Charturbhuj, who brought this suit and verified the plaint, was not the recognised agent of His Highness the Holkar. They cited *Mokha Harakraj Joshi v. Biseswar Doss* (a).

Cur. adv. vult.

GIBBS, J. :—The only issue in this case is, whether Sudasuk Chuturbhuj is the recognised agent of the plaintiff and as such entitled to file this suit. That question turns on the construction to be put upon Cl. 2 of Sec. 17 of Act VIII. of 1859. Now the evidence given in the case shows clearly that Sudasuk Charturbhuj was appointed the *munim* of His Highness Tukoji Maharáj Holkar, when His Highness carried on business in Bombay in 1865 under the firm of Sadasew Martund, and that he is now employed in winding up the business of that firm. The defendant relied on the case of *Mokha Harakraj Joshi v. Biseswar Doss*. In that case, however, no admitted firm any longer existed. Here it is different, for a firm does exist, though, no doubt, it is not actively carrying on business; but it would be exceedingly inconvenient, when the business of a firm *actively* ceases, that the power of the *munim*, conducting the business of that firm to file suits on its behalf, should also immediately cease.

(a) 5 Beng. L. Rep. Appx. 11.

The plaintiffs have relied on the decision of Sir Charles Sargent in *His Highness Tukoji Maharáj Holkar v. Pitámbar Náráyan*; in that decision I concur. I, therefore, think that Sudasuk Chaturbhuj was duly authorized to act as the agent of His Highness Tukoji Maharáj Holkar in bringing this suit, and I find the only issue that has been raised in the affirmative and for the plaintiff, who must have his costs upon this part of the case. There must be a reference to the Commissioner to take the account in the usual form and as prayed in the plaint.

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Decree accordingly.

Attorneys for the plaintiff :—*Hearn, Cleveland and Peile.*

Attorneys for the defendant :—*Dallas and Lynch.*

[ORIGINAL CIVIL JURISDICTION.]

Original Suit No. 746 of 1870.

S. R. 6 Bom. H. C. Rep. 11.
S. R. 4 Bom. H. C. Rep. 11.
S. R. 1 Bom. H. C. Rep. 11.
Nov. 11.

HARGOPA'L PREMSUKDA'S and another...*Plaintiffs.*

ABDUL KHA'N HA'JI MUHAMMAD.....*Defendant.*

Limitation—Adjustment of accounts—Fresh starting-point—Cause of action—Jurisdiction—Letters Patent of High Court, Cl. 12.

In order that an unsigned adjustment and settlement of accounts may operate to give a fresh starting-point from which limitation commences to run, there must be cross-demands, the striking of the balance between which constitutes a new consideration for the promise on the part of the person against whom the balance is found to pay the balance so settled.

Mulchand Guldbehand v. Girdhar Mádhav (8 Bom. H. C. Rep. A. C. J. 6) followed.

H. died at Ajmere, his representative then and at the time of suit brought, being resident there. Previously to the death of H., a cause of action had accrued against him in Bombay.

Held that it was not necessary to obtain the leave of the court under Clause 12 of the Letters Patent before instituting a suit against H's representative in respect of such cause of action.

THIS was a suit brought to recover from the defendant, as the heir and legal representative of Háji Muhammad Khan (deceased), the sum of Rs. 6,761, which was alleged to

1872. be the balance due on an account adjusted in Bombay, and
 HARGOPAL dated the 15th March 1866, after giving credit for certain
 PREMSUK sums received on account after the adjustment. The entry
 DAS in the books of the plaintiff, from which the adjustment
 v. appeared, was as follows :—
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“Balance claimable on the 1st of Chaitar Sud of Samvat 1923 (17th March 1866), after adjusting (the account) the balance was drawn, and a promissory note was executed..... Rs. 10,000.” The suit was filed on the 8th of October 1870.

The facts of the case appear from the judgment of the Court.

The suit was tried before BAYLEY, J., in a Division Court.

Latham (with him *Pigot*) for the defendant contended that the cause of action, upon which the suit was brought, did not arise wholly within the local limits of the High Court's Jurisdiction, as the inheritance to his father's estate had devolved upon the defendant at Ajmere. He also contended that the adjustment, upon which the suit was brought, was not of such a nature as to give a fresh starting-point from which limitation might be calculated. He cited *Umedchand Hukamchand v. Sha Bulakidas Lalchand* (a), *Mulchand Gulabchand v. Girdhur Madhav* (b), *Kunhyalal v. Bunses* (c), *Sabharama v. Eastulu* (d), *Doyle v. Allum Biswas* (e), *H. D. Tripp v. Kubeer Mundul* (f), *Hirada v. Gadiyi* (g), *Ashby v. James* (h), *Jones v. Ryder* (i), *Clark v. Alexander* (j), *Reeves v. Hearne* (k), *Irving v. Veitch* (l).

Marriott (with him *Leith*) contended that the suit was not barred, and that, in fact, there had been such a setting off of cross-demands at the adjustment of accounts as to raise an implied contract on the part of Háji Muhammad Khán to pay the balance. On the point as to jurisdiction, he cited *Todd v. Parbutti* (m).

(a) 5 Bom. H. C. Rep. O. C. J. 16.

(b) 8 Bom. H. C. Rep. A. C. J. 6.

(c) 1 Agra F. B. R. 94.

(d) 3 Mad. H. C. Rep. 378.

(e) 4 Calc. W. Rep. S. C. C. 1.

(f) 9 Calc. W. Rep. Civ. R. 209.

(g) 6 Mad. H. C. Rep. 197.

(h) 11 M. & W. 542.

(i) 4 M. & W. 82.

(j) 13 L. J. C. P. 133.

(k) 1 M. & W. 323.

(l) 3 M. & W. 90, 107. (m) 2 Hyde 17.

Latham referred to *Story's Conflict of Laws* 514 a, and to *Pott v. Clegg* (n).

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Cur. adv. vult.

11 Nov. 1872. BAYLEY, J. :—The plaintiffs in this suit, who are Márvádi Bankers of Hyderabad in the Deccan and carry on business in Bombay and elsewhere in India, sue the defendant, an infant of the age of eight years, as the legal heir and representative of his father, the late Háji Muhammed Khán Munshi, to recover Rs. 6,761, being the balance alleged to be due in respect of certain money-transactions between the plaintiffs and the said Háji Muhammad Khán in Bombay, in the years 1865 and 1866. The said Háji Muhammed Khán died in or about February 1868, it was alleged, at Ajmeer, where the present defendant now resides.

The particulars of demand annexed to the plaint, show the above balance, after giving credit for certain payments alleged to have been made on account in 1866 and 1867.

The suit came on for hearing before me in August last when the following issues were framed :—

(1.) Whether this suit is barred by the Act to provide for the Limitation of Suits (Act XIV. of 1859) ;

(2.) Whether this Court has jurisdiction to try and determine this suit ;

(3.) Whether the plaintiffs are entitled to recover the amount claimed, or any part thereof.

Upon the question raised by the second issue, I entertain no doubt that this Court has jurisdiction to try and determine this suit.

The amount sued for is the balance alleged to be now due in respect of two sums of Rs. 5,000 each lent, in Bombay, by the plaintiffs to Háji Muhammad Khán. The cause of action, in respect thereof, was complete in his lifetime, and, indeed, the plaintiffs rely upon an adjustment of his account made by him with the plaintiffs' servants on or about the 17th March 1866. An action might unquestionably have been

1872. brought against him in this court in his lifetime, and his death, by the act of God, does not deprive his creditors of the right, which, by his contract with them in Bombay, they had acquired to have their claims against him or his estate, wherever it might be situated, adjudicated upon in the High Court of Bombay. * * * The representative of a deceased person may be sued in that court within the jurisdiction of which the cause of action with the deceased person arose : *Todd v. Parbutty (o)*, a decision of PEACOCK, C.J., and NORMAN, J.

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The second issue must, therefore, be found in the affirmative and for the plaintiffs.

The defence, however, was mainly rested upon the issue as to the Act for the Limitation of Suits ; and the facts upon this point lie in a very small compass.

Háji Khán Muhammad, who appears to have been a native of Ajmere, being in Bombay in the year 1865, borrowed from the plaintiffs upon his personal security, first, a sum of Rs. 5,000, either on the 24th September 1865, the date given in the plaintiffs' journal entry, or on the 28th September 1865, the date given in the cash-book entry ; and he borrowed another sum of Rs. 5,000 on the 15th March 1866. The money was paid in currency notes, but no receipt or acknowledgment was taken by the plaintiffs on either occasion.

The plaintiffs sent their man, Ganeshdás Rámnáth, a few days after the 17th March 1866, to Háji Muhammad Khán's residence, near Byculla, to obtain an acknowledgment or promissory note from him. Ganeshdás Rámnáth took the firm's account books with him, which he showed to Háji Muhammad Khán, who compared them with his own accounts and found them correct. He, thereupon, wrote a receipt for the balance ; but as it was not stamped, and by the provisions of the Stamp Act could not be stamped or the penalty taken at the hearing, the Court was compelled to reject the document. Had it, however, been received in evidence, it would not have influenced the opinion at which I have arrived on this branch of the case.

Besides the interest, which appears throughout to have been calculated at $7\frac{1}{2}$ annas per cent., there were two small items in the account, one of Rs. 79-25 and the other of Rs. 65. (His Lordship stated the facts with reference to these items, which shortly were, that Hájí Muhammad Khan handed to the plaintiffs certain silver ornaments. These the plaintiffs sold by the directions of Hájí Muhammad Khán, and credited him with their proceeds before the accounts were adjusted. His Lordship proceeded):—

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Now, it was upon these items, namely, of Rs. 79-25, and Rs. 65, that the learned counsel for the plaintiffs endeavoured to shew that the adjustment, which took place with Hájí Muhammad Khán Munshi one or two or three days after the 17th March 1866, was in fact a set-off and appropriation of cross-demands, and that the balance struck and the payment thereby impliedly promised constituted a new consideration for the promise to pay the settled balance, and consequently that the present suit was brought in time.

I think it clear that there was no mutual account, nothing in the nature of a real set-off on the side of Hájí Muhammad Khán. The evidence amounts to this: The plaintiffs make up their account and send their servant, Ganeshdás Rámnáth to Hájí Muhammad Khán, who compared his accounts with those of the plaintiffs, and found them to agree. The parties are agreed as to the calculation of interest, and Hájí Muhammad Khán accepts, without any dispute or dissent, the item of Rs. 79-25, the amount realized by the sale of the pair of wristlets, and also apparently the item of Rs. 65, the amount realized by the sale of the other ornaments.

Mr. Marriott, on behalf of the plaintiffs, argued that those two items were in the nature of cross-demands, and that if omitted in the particulars of demand in the present suit, the defendant could only have pleaded them by way of set-off. I do not think such is the proper mode of regarding those items.

Had Hájí Muhammad Khán handed to the *munim* of the plaintiffs those two sums in cash, the argument would have

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had no foundation whatever. Instead, however, of doing that, Háji Muhammad Khán, to quote Ganeshdás Rámnáth's evidence in his examination-in-chief, "gave certain silver ornaments to the *munim* with instructions to sell them and credit them to his account." * * * Háji Muhammad Khán constituted the plaintiffs' firm his agents to dispose of the ornaments for what they were worth and to credit the proceeds to his account. That was done, and Háji Muhammad Khán, on being told the amount they had realized, appears at once to have assented.

The transaction seems in substance the same as if Háji Muhammad Khán had actually paid the two sums of Rs. 79-25 and Rs. 65 in cash to the plaintiffs' *munim*. These two items seem to me to stand in the same category as payments from time to time made on account. Háji Muhammad Khán had, in truth, no claim or cross-demand whatever against the plaintiffs' firm. He had borrowed two sums of Rs. 5,000 each from them, and all that was required to be done, was to see how much had been paid or credited on account and to calculate the interest.

Ganeshdás Rámnáth, in his cross-examination, said : "He (Háji Muhammad Khán) read over item by item and said 'I have compared your account and it is correct?'"

This case appears to me to be governed by the decision, on the 17th January 1871, of Mr. Justice Melvill and Mr. Justice Kemball in *Mulchand Gulabchand v. Girdhar Mádhar* (p), in which case the court said, that there were no mutual transactions, and nothing in the nature of a set-off, but only the plaintiffs' accounts showing a debt due, and payments from time to time made by the defendant.

I also think the present case falls within the principle of the decision of Scotland, C.J., and Innes, J., in the High Court of Madras in the case of *Hirada Karibasappah v. Gadigi Muddappa* (q).

That was in substance a case of part payment at intervals of a varying debt and the admission of the correctness of

(p) 8 Bom. H. C. Rep. A. C. J. 6.

(q) 6 Mad. H. C. Rep. 197.

the entries in the plaintiffs' books and the balance shown by them.

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The Court say at page 200 : " To render an arrangement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available here in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must, we are of opinion, be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action. As observed by Parks, B., in *Jones v. Ryder*, 4 M. & W. 32, 'a mere acknowledgment within the six years of an antecedent debt cannot be sufficient. There must be a new contract.' In England such an arrangement might also be made available in answer to a plea of the Statute of Limitations on the ground of part payment evidencing a promise to pay the balance: See on this point *Worthington v. Grimsditch*, 7 Q. B. 479, and the judgment of Alderson B. in *Ashby v. James*, 11 M. & W. 542. But that ground is excluded by the provisions of the Indian Act of Limitations. * * * What we must look to see is, whether the arrangement involved any new consideration for the promise to pay the balance. Now, where there are cross-demands, and on a settlement of accounts, items, agreed to on one side, are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment promised, the mutual agreement to set-off, *pro tanto*, one set of items against the other, constitutes a new consideration for the promise to pay the settled balance, and both make a new contract. For this, *Ashby v. James*, 11 M. & W. 542, is a direct authority. But where there is no cross-claim to be set-off, and no new agreement of appropriation, a settlement of the balance due on the examination of accounts is merely a statement of an antecedent debt. The parties simply agree as to how much of the debt remains due. In such a case there is plainly no new contract. * * *

" It appears to us that the arrangement in the present case was not such a real settlement," (namely, as that in the

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cited case of *Laycock v. Pickles*, 33 L. J. Q. B. 43). "There were no cross-demands to be set-off or appropriated, but only the plaintiffs' accounts of debts and payments made on account of the amount of those debts; and the parties, agreeing as to the correctness of the items in those accounts, ascertained therefrom the balance of the antecedent debt remaining due which the respondents promised to pay. In effect they merely settled how much was the antecedent debt left undischarged by the payments. Immediately after the settlement, the appellant might have sued on the original cause of action, and, that remaining, the period of limitation, in the absence of a writing, continued to run against it. The cases of *Reeves v. Hearne*, 1 M. & W. 326 and *Clarke v. Alexander* 8 Scott, N. R. 147, are authorities bearing in support of this conclusion; and the case of *Subbarama v. Eastulú Muttusámi*, 3 Madras H. C. Rep. 378, is in principle not distinguishable. We do not think that it makes any difference in the decision of the question that the alleged settlement took place before the period of limitation had elapsed."

I have already mentioned that if the receipt, given by Háji Muhammad Khán on or shortly after the 17th March 1866 for the balance then found due on the adjustment, had been received in evidence, my opinion would still have been the same.

By Sec. 4 of Act XIV. of 1859, it was enacted that if in respect of any debt the person, who but for the law of limitation would be liable to pay the same, shall have admitted that such debt or any part thereof is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission.

The nature of the original liability in the present case was money lent by a firm of Márvádis to Háji Muhammad Khán, and profoundly ignorant of the habits and customs of India must that person be, who would suppose that Márvádis would lend money without interest.

By Clause 9 of Sec. 1 of Act XIV. of 1859, suits brought to recover money lent or interest must be brought within three years. Assuming, therefore, that Háji Muhammad Khán gave a receipt in writing on or within a few days of the 17th March 1866 for the balance then found due on the adjustment of accounts, the three years from that date, within which the plaintiffs ought to have brought their suit, would have expired before they brought the present suit, the plaint in which was not filed until the 8th October 1870.

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The issue, therefore, whether this suit is barred by the Act to provide for the Limitation of Suits (Act XIV. of 1859), must be found in the affirmative and for the defendant.

The third issue, whether the plaintiffs are entitled to recover the amount claimed or any part thereof, must be found in the negative and for the defendant.

And I pass a decree for the defendant, but, looking at all the circumstances of the case, without costs, of which each party must bear his own.

Attorneys for the plaintiffs :—*Macfarlane and Skipsey.*

Attorneys for the defendant :—*Craigie, Lynch, and Owen.*

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Dec. 2.

[ORIGINAL JURISDICTION.]

*Crown Side.**In re* THE ALBERT MILLS COMPANY, LIMITED.

NASARVA'NJI ASFA'NDIA'EJI, MA'NIKJI

HORMASJI and GOKALDA'S MADANJI ...*Applicants.*SHIVJI MA'NIKBHA'I and four others.....*Respondents.**Mandamus—Company—Jurisdiction—Enforcement of Director's right by Mandamus—Casual Vacancy.*

The High Court has jurisdiction to enforce by Mandamus the right of persons duly elected Directors of a Joint-Stock Company to exercise the functions of Directors of such Company, if such rights are interfered with by the Company acting through its other Directors.

Semble that the Court will not refuse to interfere by Mandamus in such a case, merely because the office of a Director is not a permanent office, or because a Director can be removed from his office by a special resolution of the shareholders, but, in a proper case, will restore him to his legal position.

Meaning of the words "casual vacancy" considered.

ON the 12th of September, *Marriott*, in the above case, obtained from GREEN, J., a rule, calling upon The Albert Mills Company, Limited, and Shivjibhái Mánikbhái and four other directors of the Company to show cause why a writ of *mandamus* should not issue requiring them to permit each of the abovenamed applicants to exercise the office and functions of a Director of the said Company.

The Albert Mills Company, Limited, was a company registered under Act XIX. of 1857.

The facts of the case, so far as it is necessary to notice them for the purpose of this report, were these :—By the Articles of Association of the Albert Mills Company, the number of its Directors was limited to ten. Two of the directors retired annually by rotation, and their places were filled up by election at the general annual meetings of the shareholders of the Company that were usually held in the month of October or November in each year. The Board of Directors had power to fill up any "casual" vacancy that occurred upon the Board.

On the 3rd of October 1870, a meeting of shareholders was held, at which, by the election of four additional directors, the number of directors was raised from five to nine. Of these nine, two had vacated their seats at the Board before the next general meeting which was held on the 16th of November 1871, and their places had not then been filled up by the Board. At the last mentioned general meeting, two of the remaining seven directors retired by rotation and were re-elected, but nothing was said or done at that meeting, with reference to the two "casual" vacancies that then existed. On the 16th of December 1871, another casual vacancy occurred upon the Board, which was, however, on or about the same day, filled up by the Board appointing a new Director in place of the Director who had then retired. On the 1st of February 1872, Jehángir Hormasji, one of the seven directors then on the Board, died, but no steps were at that time taken to fill up the "casual" vacancy caused by his death.

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On the 25th of July 1872, several shareholders of the Company sent in a requisition to the directors, requiring them to call an extraordinary general meeting of the shareholders of the Company for the following purposes:—I.—To increase the number of directors of the Company to ten or to such less number as the meeting might determine. II.—To fill up the offices so created by the election of qualified persons. This requisition was laid before the Board of Directors on the 12th of August, and in pursuance of it, a meeting of the shareholders was, by the order of the directors, advertised for the 4th of September following.

On the 2nd of September 1872, a majority of the directors passed a resolution, appointing Bhaváni Vishvanáth Devdat Dánu, and Bhagván Bhaván to act as directors, thus raising the number of directors to nine.

At the extraordinary general meeting held on the 4th of September, a majority of the shareholders elected the three applicants directors of the Company, treating the appointment made by the Board of Directors upon the 2nd of September 1872 as null and void. The present application

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was in effect made for the purpose of establishing the validity of the election of the applicants, and the invalidity of the appointment made by the Board of Directors on the 2nd of September 1872. It was alleged that the majority of the Board of Directors was acting in direct opposition to the wishes of a large majority of the shareholders.

The rule came on for argument before GREEN, J., on the 18th of November 1872.

Anstey and Latham showed cause:—I.—The present is not a proper subject for a *mandamus*, as the Albert Mills Company is not a public Company, and the object for which the writ is sought by this application, is not to compel the performance of a public duty; in which case only will a *mandamus* issue against a private Company: *R. v. London Assurance Company* (a), *R. v. The Bank of England* (b), Com. Dig. Tit. *Mandamus* B. Vin. Abr. Tit. *Mandamus*, where *R. v. Cutlers Company* and *R. v. Gunmakers Company* (c) are cited. See also *Vaughan v. Gunmakers Company* (d), *R. v. Turkey Company* (e), *R. and Middleton v. Corporation of New River* (f). The cases of *Thames Haven Dock Co. v. Rose* (g); *Anonymous case* (h) and *Da Costa v. Russia Co.* (i), are relied upon by text writers as decisions to the contrary, but in the former, there is a mere *dictum*, and the cases in *Strange* are not of authority.

II.—Even if the court has jurisdiction to issue a *mandamus* in a case like the present, it will not, in its discretion, interfere in the management of the affairs of a private Company: *Mogley v. Alston* (j), *Reg. v. Alderson* (k), *Foss v. Harbottle* (l), *Atwool v. Merryweather* (m), *East Pant du United Lead Mining Company (Limited) v. Merryweather* (n), *Reg. v. Victoria Park Co.* (o).

- (a) 5 B. & Ald. 899. (b) 2 B. & Ald. 621.
 (c) W. Kely 280. (d) 6 Mod. 82. § (e) 2 Burr. 943,999.
 (f) Siderfin. 169; S. C. 1 Levinz 123.
 (g) 4 M & G. 552. (h) 2 Strange 696.
 (i) *Ibid* 783; S. C. Fitg. 4.
 (j) 1 Phillpotts 790. (k) 1 Q. B. 878. (l) 2 Hare 461.
 (m) 37 L. J. Ch. 35. (n) 2 H. & M. 264. (o) 1 Q. B. 288.

III. As the office is full, a writ of *quo warranto* is the proper remedy. At any rate the writ of *mandamus* ought to be directed to the persons *de facto* in possession : Com. Dig. Tit. Mandamus B. ; *R. v. Mayor of Colchester (p)*, *Ex parte Nash (q)*.

IV. The office of a director is a temporary one, from which he can be removed at the will of the shareholders ; a *mandamus*, therefore, will not lie to compel him to be admitted to his office : Tapping on Mandamus p. 175 ; *Le Roy. v. Champion (r)*, *Hill v. The Queen (s)*, *Evans v. Heart of Oak Benefit Society (t)* ; Com. Dig. Tit. Mandamus.

V. The Board of Directors had power to fill up the vacancies that existed on the Board on the 2nd of September 1872, as they were "casual" vacancies, and nothing occurred at the general meeting of the 16th of November 1871 to alter their character.

They also contended that the application was not a *bond fide* one.

Marriott, in support of the rule :—On the first point, there is no other remedy open to us, and in such a case a *mandamus* invariably issues : Tapping on Mandamus p. 18, *R. v. The Commissioners for inclosing lands in the Parish of Dean (u)*, *R. v. Severn Railway Co. (v)*, *R. v. Wilt's Canal Co. (w)*. The cases cited by Lindley on Partnership p. 889 and from *Strange*, are conclusive. See *R. v. Eastern Counties Railway Co. (x)*.

The cases cited on the second point have no application. We do not ask the court to interfere in the private concerns of the Company, but to have our legal rights preserved to us.

On the third point, he cited *R. v. Rector of Birmingham (y)*, *R. v. Mayor of Cambridge (z)*, *R. v. Borough of Bossiny (a)*, case of *Aberystwith (b)*. As to the *de facto* directors

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| (p) 2 Term Rep. 259. | (q) 15 Q. B. 92. |
| (r) Siderfin 14. | (s) 8 Moore, P. C. C. 138. |
| (u) 2 M. & S. 80. | (v) 2 B. & Ald. 646. |
| (w) 3 Ad. & E. 477. | (x) 10 Ad. & E. 565. |
| (y) 7 Ad. and E. 254. | (z) 4 Burr. 2008. |
| (a) 2 Strange 1003. | (b) Ibid 1157. |

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1872. not being served, he said he only asked for a rule for a
In re *mandamus* and that they could come in on the return of
 THE ALBERT the writ.
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As to the fourth point. It is not sufficient that a person is removable at pleasure to prevent the court from interfering, the option must have been exercised: Tapping on *Mandamus* p. 175; *R. v. Slatford (c)*, *R. v. Mayor of Oxford (d)*. Directors are only removeable by special resolution.

As to the fifth point, he contended that the directors had only power to fill "casual vacancies," and that two of these filled up on the 2nd of September had ceased to be casual, by the intervention of a general meeting, and that consequently there were three vacancies which the shareholders filled by electing the applicants on the 4th of September.

The Honourable *C. J. Mayhew*, Acting Advocate General, appeared for the Directors.

Cur. adv. vult.

GREEN, J. :—In the above matter on the 12th day of September 1872 on motion made on behalf of Nasarvánji Aspandíárji, Mánikji Hormasji, and Gokaldás Madanji, a rule was granted calling upon the Albert Mills Company and on Shivji Mánikbhái, Allárákhá Shivji, Nasarvánji Ardesar Wadia, Trikamji Velji and Vallabhdás Vandravandás (whom I shall hereafter refer to as the respondent directors) to show cause why a writ of *mandamus* should not issue requiring them to permit each of the applicants, namely, Nasarvánji Aspandíárji, Mánikji Hormasji, and Gokaldás Madanji (whom I shall hereafter refer to as the applicants) to exercise the office and functions of a director of the said Company. Cause was shown against the rule being made absolute on the 18th, 19th, and 21st days of November last by Mr. Anstey and Mr. Latham on behalf of the Company, by Mr. Mayhew, Advocate General, on behalf of the respondent directors, and Mr. Marriott was heard in reply and in support of the rule. Mr. Farran stated

that he was instructed to watch the case on behalf of Jehángir Hormasji, another of the directors. A considerable mass of affidavits has been filed in the matter by the parties, a great part of the matter contained in which is, in my opinion, not very relevant to the questions which have to be determined by the court. As to much of that matter, however, I must admit, after a second perusal of the affidavits, that it is less irrelevant than at first sight it appeared to me to be.

The first objection raised on behalf of the Company and respondent directors, was, that the present case is not one in which courts in England would (apart from the provisions of the Common Law Procedure Act 1854) grant this remedy, and that the writ is granted only to enforce the right to exercise an office in some public corporation, or if directed to a private corporation, it is granted only where the purpose, for which the writ is sought, has a public character. There is no doubt that in earlier times there was an indisposition to grant this remedy in the case of corporations established for trading or private purposes, even though such corporations were public in the sense that they had been established by Royal Charter or special Act of Parliament. But there are many instances in recent times [some of which are cited in *Norris v. The Irish Land Co. (e)*] in which the courts have interfered by *mandamus* to enforce rights in corporations established for private trading purposes. I am unable to draw any distinction in this respect between trading corporations established by Royal Charter or special Act of Parliament and those established under the general powers of the statutes for the registration and incorporation of joint stock companies. Both classes of corporations are alike private as regards their nature and the purpose for which they are established, and alike public having regard to their derivation of a corporate character from Royal prerogative or legislative power. The cases collected in Mr. Lindleys' work on Partnership, 2nd edition, pp. 890-891, afford a number of instances

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(e) 8 ELL. & BL 512.

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where the courts in England in recent times have interfered in the case of corporations established for trading purposes when the case is otherwise a proper one for their interference and when no other remedy is available; and I have been unable to trace any distinction drawn between trading corporations established by Royal Charter or special Act and those established under the general statutes relating to joint stock companies. In one case, that of *Steward v. Greaves (f)*, Parke, B., expresses an opinion that the Company in question in that case (which was a banking copartnership established under the general powers of 7 Geo. IV., c. 46, and not a corporation at all) would be compellable by law (I presume by *mandamus*, as I do not know what other means of legal compulsion there would be) to appoint a public officer, if none existed, in whose name the copartnership might be sued. So in *The Thames Haven Dock Co. v. Rose (g)* both Tindal, C.J., and Maule, J., expressed an opinion that when the number of directors of a Company incorporated by a private act has fallen below the number fixed by the Act for carrying on the business and concerns of the Company, a *mandamus* would be granted to compel the filling up of the vacant places. I am of opinion on this point that according to the present state of the law in England, and apart from the provisions of the Common Law Procedure Act 1854, the right of persons duly elected directors of a company incorporated under the Joint Stock Companies Acts to exercise the office and functions of directors would, if interfered with on the part of the company acting through the other directors or officers of the company, be enforceable by *mandamus*. I am at a loss to see by what other remedy the right of such persons could be enforced, unless a writ of *mandamus* were grantable; and the absence of any other remedy has been always regarded as a strong ground for the court to award such writ.

It was then contended that even assuming that the applicants had been duly elected directors of the Company, the

(f) 10 M. & W. 711. (g) 4 M. & G. 552.

court ought not to compel effect to be given to such election by reason of the precarious nature of the office of director in a company constituted as the present Company is, and having regard in particular to the 76th article of association. On this point, the cases of *Evans. v. The Heart of Oak Benefit Society (h)*, and *Hill v. The Queen (i)*, were relied upon. In both cases, however, the applicant had been actually removed from the office in which he sought, by *mandamus*, to be re-instated, and the court being of opinion that the persons by whom such removal had been resolved upon had a discretionary power to effect such removal, the exercise of such discretion was not to be interfered with by *mandamus*. I doubt whether the law can be taken to be, that where the remedy by *mandamus* to enforce the right of a person to exercise an office is otherwise properly applicable, that the court ought to abstain from applying that remedy merely because a discretionary power of dismissal or removal resides somewhere and may possibly be exercised, unless the power has in fact been exercised, and the question is whether that exercise should be interfered with. On another branch of the case, however, this power conferred on a meeting of shareholders by article 76 to remove directors at pleasure has a material bearing in this respect, namely, that the majority of the shareholders have a sufficient and adequate remedy in their own hands against the alleged opposition of the respondent directors to admit the applicants to exercise the powers and functions of directors, and the fact that another remedy is provided, though it may not take away the jurisdiction to grant the writ, is a strong circumstance to influence the court to abstain from interfering in that way. I have, however, treated of these objections to the granting of the writ in this case less fully than would otherwise have been necessary, by reason of the conclusion I have arrived at on the vital question of the right of the applicants to claim the character of validly elected directors. If they have no such right their right to the writ falls to the ground at once, and I proceed to investigate this question without

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saying more on the several points, interesting and otherwise important as they may be, which have been raised in argument.

[His Lordship then proceeded to state the facts of the case which, in his opinion, showed that it would be undesirable to grant a *mandamus* in the present instance and continued :]

The whole matter, however, seems to me to resolve itself into this. Were there, on the 2nd September 1872, three casual vacancies in the board and were the directors on that day legally (*i.e.*, within the powers of their articles of association) justified in appointing Bhaváni Vishvanáth, Bhagván Bhaván, and Devdat Dháni to fill such vacancies ? If they were, then the general meeting of the 4th September 1872 had no power to appoint the three applicants as directors, there being already 9 duly appointed directors of the Company. As to the propriety of this resolution of the directors of the 2nd September 1872 in the face of a requisition for a general meeting of shareholders to appoint three new directors, and which meeting had been summoned for two days afterwards, it is for a general meeting of shareholders to pronounce; the only question now is was the resolution legally valid ? What then is a casual vacancy under article 72 ? The word " casual " in itself means something fortuitous, something not anticipated or predetermined. As used in article 72, it denotes a vacancy occurring otherwise than by reason of retirement on account of seniority of appointment (which is a vacancy anticipated and occurring necessarily in ordinary course) and includes vacancies occurring by reason of death or the occurrence of the casual events specified in Article 67. If this be so, then there is no doubt that at the time of the general meeting of November 1871 there were two casual vacancies in the board and two vacancies not casual, *i.e.*, occurring by reason of the retirement of the two directors, Allárákhiá Shivji and Vallabhdás Vandravandás by rotation. The two non-casual vacancies were filled up by the reappointment of the two retiring directors. It seems not to be contested that before that meeting the board might have filled up the two casual vacancies arising by Surupchand Damarsi

and Tribhuvandás Jagjivandás having become disqualified.

I cannot understand how the occurrence of that meeting can have taken from these two vacancies their casual character. It is argued that as the two casual vacancies existed and the shareholders were silent as to the filling of them, an intention not to fill them may be presumed. As to any expressed intention on their part not to fill them, it is not suggested that there is a vestige of evidence of it. Then subsequently to the general meeting of November 1871 there occurred an undoubted casual vacancy by the death in February 1872 of Hormasji Pestanji. I cannot see that any such inference as is suggested is necessarily to be drawn from the omission of the shareholders at the meeting of November 1871 to fill up the places of Surupchand Damarsi and Tribhuvandás Jagjivandás, which had become vacant during the preceding year; and I consider that it is quite as reasonable to infer from that silence that the shareholders did not desire to interfere with the power of the directors to fill up these vacancies (a power which it cannot be denied existed down to the time of the meeting) as to make the other inference which is contended for. For these reasons, I am of opinion that the appointment by the directors present on the 2nd September of Bhaváni Vishvanáth, Bhagván Bhaván and Devdat Dháni to be directors was a valid one and that the appointment by the general meeting of shareholders on the 4th September of the applicants as directors was not a valid one. If this be so, the whole right and title of the applicants to have the writ granted falls to the ground, and I must, therefore, discharge the rule and with costs.

Attorneys for the applicants :—*Manisty and Fletcher.*

Attorneys for the respondents :—*Hearn, Cleveland and Peile.*

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Jan. 25.

[APPELLATE CRIMINAL JURISDICTON.]

REG. v. HARGOVANDA'S AND HARKISSANDA'S.

Extraordinary jurisdiction of High Court—Offence not constituted by acts proved—Cheating—Indian Penal Code, Sec. 417.

Where the High Court was of opinion (in a case in which no appeal lay to it) that the facts found by the Court that tried the prisoners and the Court of appeal from such Court did not constitute the offence of cheating of which the prisoners had been convicted, the High Court, in the exercise of its extraordinary jurisdiction, reversed the conviction and sentence.

To justify a conviction for the offence of cheating there must be some evidence of an intention to cheat at the time when the promise (the omission to perform which completes the offence of cheating) is made.

IN this case the accused, Hargovindás and Harkissandás, were tried by Manekjee Cowasjee Entee, Magistrate F. P. at Broach, for the offence of cheating, and on the 4th September 1871 were convicted and sentenced each to suffer rigorous imprisonment for a period of six months and to pay a fine of Rs. 500 or, in default, to undergo imprisonment of the same kind for a further period of three months.

On appeal, the Session Judge of Surat (W. H. Newnham) upheld the conviction and sentence. The facts of the case sufficiently appear from the following decision of the Session Judge :—

“ It appears from the evidence that the two appellants owed some Rs. 900 to one Manohardás and on his threatening to sue them, Hargovandás agreed to mortgage their house, and a stamp paper was procured and a bond drawn up and Hargovandás signed it. It was to be completed by his brother's signature and attested. Afterwards, however, Hargovandás demanded an advance of Rs. 200 more for another creditor, which Manohardás refused to make; while Hargovindás refused to have the bond completed till he received this money. It never was completed, for both the appellants made a mortgage of the house to one Uchrutlal, and Manohardás, hearing of this, went to the Sub-Registrar's office to try and hinder the bond being registered. But this could not be done.

"Hargovandás tries to prove that the Rs. 919 entered in the uncompleted bond, included the Rs. 200 he demanded, and that he would not have the bond completed, because Manohardás would not pay him the Rs. 200 till it was registered, and would not make a separate entry of the 200 rupees in the bond ; but he has totally failed to shew this. I find the facts to be as set forth above.

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"The Magistrate has held that the concealment of the intention to mortgage to Uchrutlál was a deception which induced Manohardás to 'omit to do' what he would naturally have done, viz., prosecute his claim against the appellants, and has convicted both of them of cheating, holding that Harkissandás, the brother, must have known of the proposed mortgage of their only immoveable property to Manohardás. I think, although Manohardás ought, perhaps, to have at once broken off negotiations and sued, when he found the Rs. 200 insisted on, that there is no doubt that he was dishonestly 'kept in play' till the mortgage to Uchrutlál was effected without his being informed of it. The active party in this business was Hargovandás ; but, as the Magistrate remarks, there is every reason to suspect that Harkissandás knew of the affair, although he kept himself in the back-ground. This, however, would not be enough to convict him, if it were not that Manohardás deposes that he sent to call *both* the appellants to complete the deed, and that Ichhásháñkar, who is in his service, says that he went and called Harkissandás, telling him for what he was wanted, on which Harkissandás promised to come, but did not. I agree with the Magistrate that both the appellants practised a fraud on Manohardás, and reject the appeal."

On the 30th November 1871, a petition was presented to the High Court on behalf of the accused, praying that the record and proceedings of the case might be sent for under its extraordinary jurisdiction and the conviction and sentence passed by the Magistrate F. P. reversed. The petition was granted.

1872. The case was heard by Gibbs and Melvill, JJ., on the 25th
 REG. January 1872.
 v.
 HARGOVAN- *Shántarām Nārāyan* for the petitioners submitted that
 DA'S there was no evidence of intention to cheat which would
 and warrant the conviction. He contended that the transaction
 HARKISSAN- was purely a civil one.
 DA'S.

Dhirajlāl Mathurādas (Government Pleader):—The accused, with the view of obtaining time from their creditor and inducing him to delay the institution of a suit, made a pretended offer to mortgage their property and then withdrew from the bargain. (*Melvill, J.*:—Then in every case in which a man says, 'Don't sue me, I will pay you,' and does not pay, he cheats.)

If he offered to mortgage property and obtained time by that offer, never intending to complete the mortgage, that would be cheating. (*Melvill, J.*:—How does it appear that, when the mortgage was offered, he intended not to complete it?) There is no evidence to shew that, unless we look to the subsequent conduct as furnishing such evidence. (*Melvill, J.*:—The subsequent conduct shews, if anything, that the accused at first made the offer to mortgage and intended to complete it, but afterwards changed his mind and would not complete the transaction, unless Rs. 200 were paid.)

PER CURIAM:—The Court being of opinion that the facts found do not constitute the offence of cheating, reverses the conviction and sentence.

Conviction and sentence reversed.

[APPELLATE CRIMINAL JURISDICTION.]

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REG. V. KIKÁ'BHÁ'I PARBHUDA'S.

Defamation—Charge—Strictness of proof—Powers of High Court as a Court of revision.

In framing a charge of defamation under Act XXV. of 1861, it is not necessary to negative the exceptions contained in Sec. 499 of the Indian Penal Code.

It is not an error in law for a Judge to require a person accused of defamation to prove the several distinct imputations contained in a libellous article published by him, with the same strictness with which he would be required to prove them if he were the defendant in a civil action.

The High Court, as a court of revision, cannot interfere with the findings of the lower appellate court on questions as to the truth of the allegations contained in a libel or the *bond fides* of the accused, but upon such questions are bound by the findings of the lower court.

THIS was an application for the exercise of the court's extraordinary criminal jurisdiction.

The accused, Kikábhái Parbhudás, the Editor of the *Guzerat Mitra* newspaper, was convicted of defamation by Mr. Jaggjivandhás Khusáldás, Magistrate Full-power at Surat, and sentenced to pay a fine of Rs. 500, or in default of payment, to undergo simple imprisonment for five months. From this conviction and sentence, Kikábhái Parbhudás appealed to the Session Judge at Surat (W. H. Newnham), who reduced the fine to one hundred rupees and the imprisonment in default of payment to one month's simple imprisonment.

The facts of the case were as follows:—

In the *Guzerat Mitra* of the 1st of October 1871, there appeared a communicated article, which, when translated, ran thus:—

RAILWAY POLICE.

With regret it is to be written that the police employed in the railway for the protection of the people and prevention of offences now-a-days, forget their duty, commit and abet offences.

We hear of many instances, and also personally notice them here, of numerous police peons themselves committing thefts of goods arriving at

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the station, or of abetting the same, and of many of them being arrested and punished. They do not only commit thefts or abet them, but ill-treat passengers in a great many ways. If any poor villager or ignorant person go on, after leaving the train and delivering his ticket, with a somewhat heavy bundle, a peon immediately stops or seizes him, and says, "Come, fool, where are you running with such a large bundle. It must be weighed and paid for." The poor and ignorant villager does not know the rule or practice, and thinks in his mind, what will be done after the bundle is weighed, and in a confounded state of mind from the appearance of a harsh messenger with a dark coat says, "Meeya-Saheb, its contents are not heavy, let me go, I am a poor man. What will be the amount of fare?" The Meeya-Saheb then observes: "Tell the truth. Are you a poor man?" That man says, "Yes, Sir." Meeya says, "The fare will amount to 10 or 12 annas, but from your appearance I pity you, so pay me 6 annas and I will settle everything." The poor man then takes out about two annas from his pocket. The Meeya Saheb then speaks thus: "Favour is not accepted with gratitude. I am going to settle the brother-in-law's 12 annas' work for 6 annas, when he offers 2 annas. Don't you understand that that master, seeing your bundle, sent me to get it weighed and to recover the fare, and what answer can be given to him about the matter?" Thus a quarter or half a rupee or two annas are extorted. In the same way, the ignorant parents of children under the age of 3 years, in case there is no ticket, are threatened, and small bribery is extorted from them for self-use. Many instances of the kind are seen. One recent instance is given. Last Sunday when the first train was to start from this place for Bombay, a Bania was coming down from the upper part of the station, and a Mussalman with a white coat and white cloth about his head was sitting at the gate down stairs. The latter stopped the former and required him to produce a pass, but he replied that he had no pass. The Mussalman said that a pass worth 2 annas must be given. The Bania asked him whether he required this knowing who he was, or without knowing anything, and told him who he was and that no pass or pice would be given to him. On hearing this, the Meeya-Saheb was offended, and observed, "I know you, you are come as a big Sowkar. Your pride will now be entirely exposed." He then called 2 or 3 peons, who were stopping at a distance, and said to them: "Arrest this man. He went up without a pass and was now running away." The Bania said that he was a Company's servant, and asked whether he was to be allowed to go or not. Fakirbhái (beggar) then said that although the Bania was servant of the Company or their father, he would not let him go without a pass. The Bania was really a servant of the Company, and he went up and informed another officer of the Police of the above, and he came down and allowed him to go, but said nothing to the peon, who sat in the disguise of a beggar, for not having his dress on. Such ill-treatment on the part of the Police is often seen.

The sole cause of the above ill-treatment appears to be that the peons, havildars and other servants of this department, generally belong to the

lower classes, and on getting a coat, consider themselves possessed of full power and behave with impertinence. What rule of the police allows one to be on duty without his dress!

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The peons misappropriate excess-fares and cause loss to the Company, through its servants. In like manner the Company is obliged to compensate for goods stolen while under its charge. The Company spends a large sum of money, on account of the police department, to prevent losses, but the members of this department occasion such losses. Do the high officers of the Company then not give warnings to the officers of the police? If they do so, the irregularities of the kind may be attributed to neglect on the part of the officers of the police. If such is not the case, the peons should be held to be disregarding of their duty and officers. No other cause appears besides these two. We, therefore, only recommend that it is necessary for the Company to keep a little more supervision over this department.

Received from outside.

The Magistrate upon the evidence found, (1) that the charges made in the libel were not true; (2) that they were not made in good faith; and (3) that the accused could not claim the benefit of exceptions 1, 2, and 9, under Section 499 of the Indian Penal Code.

The Session Judge generally agreed with the Magistrate; but being of opinion that malice, in the vulgar acceptance of the term as opposed to its legal signification, was not shown, reduced the sentence.

The application was heard by LLOYD and KEMBALL, JJ., on the 2nd, 7th, and 8th October 1872.

Anstey (with him *Shántúráam Náráyan* and *Nagindás Tulsidas*) for the applicant:—

The charge was improperly drawn up, inasmuch as it does not negative the exceptions contained in Sec. 499 of the Indian Penal Code, which must be taken to be incorporated in Section 500, as the word "defame" is used therein. The provisions of Sections 26 and 27 of Act XVIII. of 1862 are, in spirit, applicable to this case, though it has been tried in the Mofussil. The general rule of law is that proof of charges involving fraud, bad faith, and similar allegations, always lies

1872. on the person making them, and in this case the *onus* ought
 REG. to have been thrown upon the prosecution by a properly
 v. drawn up charge.
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As respects the merits of the case, it is not necessary to require the same strictness in proving the truth of the libellous allegations in criminal as in civil cases under the English law, and if a single case of each sort of misconduct attributed to the police is proved, that ought to be held to be sufficient. With regard to the question of good faith and public good, the Judge ought to have decided as a point of law whether the occasion of the publication was a privileged one or not; and if the privilege was exercised in the *bond fide* belief that the allegations were true, the publication of the article ought to have been held justified, particularly as the Judge has found that there was no actual malice. The following authorities were cited in support of the application: *Taylor* on Evidence, p. 71, 103, *Reg. v. Newman* (a), *The Maharaja Libel Case*, *Lister v. Perryman* (b), *Stace v. Griffith* (c), *Wason v. Walter* (d).

Pirozshaw Merwanjee Mehta (with him *Chunilal Manehlal*)
 in support of the conviction :—

The charge was properly framed according to the clear and express wording of Sections 235-6-7 of the Criminal Procedure Code; and Section 26 of Act XVIII. of 1862 does not apply to Mofussil courts. As to the justification by truth, the criminal law in this respect, when it first allowed this plea, was rendered identical by 6 & 7 Vict., C. 96, Section 6, with the law in actions for defamation, which is that every allegation must be substantially proved by specific instances. The Judge has found as a matter of fact that the libellous imputations in this case were not so proved, and his finding is conclusive and cannot be questioned in this court. As respects the question of good faith and public good, both according to English and Indian law on this

(a) 1 E. & B. 558, 577.
 (c) L. Rep. 2 P. C. 420.

(b) L. Rep. 4 Ho. Lo. 521.
 (d) L. Rep. 4 Q. B. 73.

subject, it is necessary to show that due care and attention have been exercised before good faith can be established. Section 52 of the Indian Penal Code must be taken to add an essential constituent element to the ordinary acceptation of the term "good faith." The Judge has found, as a fact, that due care and attention were not exercised, and was therefore right in holding that good faith, the burden of proving which lay in such a case as this upon the defendant, was not proved. The following authorities were cited in support of the argument; *Reg. v. Durzoola and others* (f), *Sealy v. Ram Narain Bose* (g), *Reg. v. Pursoram Doss* (h), *J'anson v. Stuart* (i), *Holmes v. Catesby* (j), *Clarkson v. Lawson* (k), *Helsham v. Blackwood* (l), *Weaver v. Lloyd* (m), *Willmet v. Harmer* (n), *Chalmers v. Shackell* (o), *R. v. Newman* (p), *Campbell v. Spottiswoode* (q), *The Maharaj Libel case*, *Howard v. Mull* (r).

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PER CURIAM:—This is an application for the exercise of this court's extraordinary jurisdiction on behalf of one Kikábhái Parbhudás, who, as editor and publisher of the "Guzerat Mitra," was charged with, and convicted of, having in an article headed Railway Police, and published in his paper issued on the 1st October 1871, defamed the whole body of police employed on the B. B. and C. I. Railway by imputing to them theft, abetment of theft, extortion from passengers on the railway, and breach of trust. The Magistrate Full-power, who tried the case, found that the accused had failed to establish that the imputations made concerning the police were true, or that he had acted in good faith in publishing those imputations, and sentenced Kikábhái to pay a fine of Rs. 500 (five hundred), or to suffer five months' simple imprisonment. An appeal was preferred to the

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| (f) 9 Calc. W. Rep. Cr. R. 33. | (g) 4 Ibid. 22. |
| (A) 2 Ibid. 36; 3 Ibid. 45. | (i) 2 Smith's L. C. 57 (6th edn.) |
| (j) 1 Taunt. 543. | (k) 6 Bing. 266. |
| (l) 11 C. B. 111. | (m) 2 B. & C. 678. |
| (n) 8 C. & P. 695. | (o) 6 C. & P. 475. |
| (p) 1 E. & B. 577. | (q) 3 B. & S. 769. |
| (r) 1 Bom. H. C. Rep. App. lxxxv. | |

1872. Session Judge, who affirmed the finding of the Magistrate
 REG. Full-power on the two points above noted, but reduced the
 KIKÁ'BHÁ'I sentence to one of Rs. 100 fine, or in default, one month's
 PABBHUDA'S imprisonment (simple), on the ground that Kikábbái appeared from the evidence to have erred more through carelessness than of express malice. Dissatisfied Kikábbái asks for our interference on the following grounds :—

(a) That the conviction and sentence are contrary to law ;

(1stly) Because the B. B. and C. I. Railway Company's police was not definitely mentioned in the article complained of ;

(2ndly) Because the charge did not deny the existence of circumstances, bringing the article complained of within the exceptions to Section 499, Indian Penal Code.

(3rdly) Because, upon the evidence believed by the lower court, and upon the facts found, the assertions in the article in question contained ought in law to have been held to be true ;

(4thly) Because, even if not held to be strictly true, yet upon the evidence believed by the lower courts and upon the facts found, the assertions in the article in question contained, ought to have been held to have been made in good faith for the public good.

(c) The lower court applied the rules of pleading and procedure in civil suits under English law to this case in holding that, in establishing the truth of the allegations charged as a libel, the accused must prove strictly (and not substantially) that such allegations are true.

(d) The lower court excluded nearly the whole of the evidence from its consideration on the ground that Rattan-shankar and Edalji Jehangirsha alone, out of the whole of the witnesses, say that they communicated instances of misconduct to the petitioner, whereas the whole of the evidence was useful to prove the *bonâ fides* of the petitioner.

(e) The Magistrate Full-power refused to receive certain evidence material to the case of the petitioner, and this

irregularity, even though complained against to the lower court, was not rectified.

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(f) The lower court having found that there was no malice, ought to have reversed the conviction and sentence, especially, as the evidence tendered for the prosecution to prove a malicious motive was not believed by the lower court.

With regard to the first two points but few words are necessary. As to the application of the imputations to the complainants, the Railway Police stationed about Surat, all the circumstances clearly indicate the intention of the accused so to apply his words. This has been definitely found by both the lower courts as a fact, and it is a matter of surprise to us that such an objection should have been taken here. On the second point, Mr. Newnham was perfectly right in holding that it was unnecessary that the charge should have negatived the exceptions contained in Sec. 499; the language of the Criminal Procedure Code is perfectly clear, and the section referred to in the charge is the section under which the offence is punishable, and not the section which defines the offence. The main objection contained in the remaining points is, that the Judge ought to have found that the imputations made by the accused were true, and that the accused in publishing them acted in good faith—and the question we have to determine is, whether the Judge committed any error in law in affirming the finding of the Magistrate F. P. on these points. It was strongly pressed upon us at the outset that Mr. Newnham was wrong in law in holding that the burden of proving good faith lay on the accused. Mr. Newnham however was in our opinion quite right in putting out of his consideration the provisions of Sec. 27, Act XVIII. of 1862, as having reference only to this court in its original jurisdiction, and though we are not prepared to endorse his reasoning and to hold that in every case of alleged defamation the onus is on the accused to prove good faith, still, we think that, bearing in mind the fact in this case that the accused imputed to the complainants particular criminal acts which injurious charges were capable

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of proof, Mr. Newnham rightly refused to presume good faith and ruled that it was for the accused to show affirmatively as matter of defence, that he came within those exceptions in Sec. 499, involving good faith under which he claimed to excuse himself.

It has not been disputed that the imputations on the complainants were libellous and consequently malicious but they have been justified on the grounds, that they were true, it being for the public good that they should be published, and that they were made in good faith as respecting the conduct of public servants in the discharge of their public functions, in other words accused pleaded the legal occasions and circumstances set forth in exceptions 1, 2 and 9 to Sec. 499 Indian Penal Code as excluding his responsibility. Two whole days were consumed in endeavouring to show on behalf of the accused that the Judge was wrong in law in his findings on the above points, but, whatever may be our own views as to the merits of the case, it appears clear to us that whether the Session Court rightly or wrongly decided as to the truth of the allegations and the *bona fides* of the accused's conduct, we have no power as a court of revision to interfere. As regards the truth of the imputations it was urged, that Mr. Newnham had failed to draw a proper distinction between a civil action and a criminal prosecution, and ought to have found that the charges were true in substance; but, in the first place, we are unable to perceive that the Session Judge was wrong, as a matter of law, in requiring the several distinct imputations contained in the libellous article to be proved, and, secondly, whether or no the said imputations were sufficiently justified by the facts proved was a matter of fact which cannot here be called in question. Fault has been found with the Judge's remark that the charges were "not proved as they should be," but this appears to us to mean that they were not substantially true, in other words, that they were not justified by the evidence.

So also, in the case of the judge's finding as to the good faith of the accused in making the imputations on the

character of the complainants, much has been said about a *justifying occasion* and the duty of the Judge to decide as a matter of law, whether the present was such an occasion as to rebut the inference of malice, and great stress was laid on the judgments of two learned Judges of the late Supreme Court of Bombay in the Maharaj Libel Case. No doubt where the occasion is pleaded by way of justification and excuse, the question whether or no the occasion gives the privilege is one of law for the Judge, but this is at best but a qualified protection dependent on the question whether the publication has been made in good faith, and this is a question of fact which the Judge has decided against the accused and which, whether rightly or wrongly decided, is conclusive so far as we are concerned. The law on the point is clearly laid down in all the text books relating to the subject, and we find the same rule enunciated in the judgments above referred to. Sir M. Sausse, after quoting the definition of a "justifying occasion" from the judgment of Baron Parke in *Toogood v. Spyring*, 1 C. M. & R. 193, says: "In cases of this kind when tried before a jury it is their province to find whether the communication was made *bond fide* or not; and, if in the affirmative, it becomes the duty of the Judge, as matter of law, to decide whether the occasion of the publication was such as to rebut the inference of malice or in accordance with the definition in *Bromage v. Prosser* (s) whether there was any legal justification or excuse for the wrongful act. I have thus to investigate and decide first whether the publication was made *bond fide* by the defendants, and next, if it were, whether then a legal justification or excuse is to be found in the surrounding circumstances proved in this case for the libel upon private character which the publication contains." And Sir Joseph Arnould similarly says: "The doctrine of justifying occasion as deduced from the authorities is this. The essence of libel is malice. *Prima facie* every publication containing matter tending to defame or criminate another is held to be libellous; that is, malice, the essence of libel, is legally inferred from the mere fact of publishing of another that which tends to criminate

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(s) 4 B. & C. 247.

1872. REG. v. KIKABHAI PARBHUDAS. or defame him. But the *prima facie* inference may be repelled; it may be shown that the circumstances under which the publication took place were such as to preclude the legal inference of malice arising from the mere fact of publication, and constitute a *justifying occasion* for publishing that which tends to defame and criminate another. * * *

As to what will constitute a justifying occasion the points principally to be attended to are these.—First, the publication must be *bona fide*, i.e., at the time of publication the writer must honestly and upon fair reasonable grounds believe that which he publishes to be substantially true. Secondly, the publication must be with regard to a subject matter in which the party publishing has an *interest*, or in reference to which he has a *duty*. Thirdly, those to whom the publication is addressed must have an interest and a duty in some degree corresponding to his own."

Exception has been taken to Mr. Newnham's observation (after declaring the truth of the allegations to be not proved) that "If however they were made in good faith; it is undeniable that they would be for the public good." But in saying this he appears to us clearly to recognize the principle of qualified exemption as comprehending the case of a communication made honestly with a view to the discharge of a legal or moral duty. It must be borne in mind that we are not trying this case, we shall, therefore, confine ourselves strictly to the law of it. The whole case was open before the judge in appeal, and he has held that instead of acting with good faith on an occasion recognized by the law, the accused acted carelessly and negligently in publishing the imputations, though without any fixed malicious motive; and upon this finding we are unable to say that he committed any error in law in affirming the conviction by the Full Power Magistrate, the question of civil and criminal liability being indeed clearly identical though it was argued to the contrary. It seems hardly necessary for us to observe in conclusion that the Session Judge was right in looking to Sec. 52 of the Indian Penal Code for the defamation of good faith, though the point has been disputed in argument.

With regard to the remaining objection of exclusion of evidence, we think that the Judge was not wrong in law in rejecting evidence of general reputation where the question of the truth of definite charges was in issue, and also in refusing consideration to what had been published on former occasions in the same paper by another editor.

The result is that we must reject this application.

Petition Rejected.

In re GEORGE BLACKWELL.

Insolvency—European British born subject—Jurisdiction—11 & 12 Vic., c. 21., s. 5—Letters Patent of High Court, Cl. 18.

A European British born subject, residing in the Bombay Presidency but outside the local limits of the jurisdiction of the High Court, is entitled to come to Bombay and present a petition in the Court for the Relief of Insolvent Debtors and obtain the benefit of the Indian Insolvent Act, as the original jurisdiction of the Supreme Court is in that respect continued to the High Court by Clause 18 of its Letters Patent.

THE petitioner in this case was a British born subject. He had a house in Puna in which he used to reside with his family. He came to Bombay about the month of September 1871, being then out of employment, leaving his family at Puna and resided sometimes at an hotel and sometimes with his friends; and on the 15th December 1871, while so temporarily resident in Bombay, he filed his petition and schedule; when the case came on for hearing he had left Bombay to take up an appointment at Sattara.

Marriott for the opposing creditors opposed the insolvent's discharge on the grounds (*inter alia*) that he was not resident within the local jurisdiction of the High Court, and therefore was not entitled to his discharge. He cited *in re Cockburn* (a); *in re Tietkins* (b).

Starling for the Insolvent cited *Holroyd v. Gwynne* (c).

(a) 2 Ind. N. S. Jur. 326. (b) 1 Beng. Law Rep. O. C. 84.
(c) 1 Rose 113; S. C. 2 Taunt. 176.

1872. **GIBBS, J.** :—As in this case I am of opinion that the second
In re
GEORGE
BLACKWELL. ground of opposition has entirely failed, the sole point that
 remains for decision, is that of the jurisdiction of this Court
 to grant the insolvent his discharge. This question of juris-
 diction is of some importance. The present charter of the
 High Court, cl. 18, gives the judge, sitting in insolvency, power
 “to have and exercise, within the Presidency of Bombay,
 such powers and authorities with respect to original and
 appellate jurisdiction and otherwise, as are constituted by
 the laws relating to insolvent debtors in India.” By the 5th
 sec. of the Insolvent Debtors’ Act 11 & 12 Vic., ch. XXI.,
 any person who shall reside within the jurisdiction of any of
 the Supreme Courts at Calcutta, Madras, and Bombay shall be
 able to take the benefit of the Act. Now this jurisdiction is
 to be found in the charter of the late Supreme Court, and
 the clause runs thus, (clause 28): “The jurisdiction, powers,
 and authorities of the said Supreme Court of Bombay shall
 extend to all such persons as have been heretofore described
 and distinguished, in our charters of justice for Bombay, by
 the appellation of British subjects, who shall reside within
 any of the factories subject to, or dependent upon the Govern-
 ment of Bombay ;” and by the next section jurisdiction
 is given “over the inhabitants of Bombay,” meaning the
 town and island. Thus the jurisdiction of the late Supreme
 Court was twofold—local, as respected the inhabitants
 of the town and island of Bombay; and personal, as re-
 garded European British-born subjects, as they are now
 called, residing in any part of the territories subject to
 the Bombay Government. This latter jurisdiction, as re-
 gards civil actions, does not now exist, but, as regards the
 Insolvent Court, it has not been interfered with. Mr. Black-
 well is a European British-born subject, and even if his
 residence at friends’ houses or at an hotel in the island
 of Bombay at the time he filed his petition, was not sufficient
 —and this the court would hesitate to affirm after the case of
Holroyd v. Gwynne,—the judgment of Sir Barnes Peacock
in re Cockburn seems decisive to show that he is enti-
 tled to seek for, and that it is competent for this court to

extend to him, the benefit of the Indian Insolvent Act. That learned judge observed that Mr. Justice Norman's decision dismissing the insolvent's petition for want of jurisdiction was good, because his then residence, Garden Reach, was not within the local limits of the jurisdiction of the High Court at Calcutta ; "and," he adds, " it was not shown that the petitioner was a European British subject"—clearly intimating that, if it had been, the jurisdiction would have been complete, as it would apparently have also been had he been a servant of Government. In the case *In re Tietkins* a temporary residence of an insolvent at an hotel solely for the purpose of filing his petition under the Act, and an immediate departure, was apparently held insufficient " residence" to give jurisdiction, but the decision also turned on the fact that the petitioner's permanent residence was at Cawnpore, in the N. W. Provinces, beyond the jurisdiction of the High Court, which by the last charter of 1865 was limited to Bengal Proper. I, therefore, hold that the jurisdiction is clearly sufficient, and finding no cause of opposition proved, direct the petitioner to be sworn to the truth of his schedule and discharged.

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ACTS OF PARLIAMENT.—See STATUTES.

ADJUSTMENT OF ACCOUNTS.—

In order that an unsigned adjustment and settlement of accounts may operate to give a fresh starting point from which limitation commences to run, there must be cross demands, the striking of the balance between which constitutes a new consideration for the promise, on the part of the person against whom the balance is found, to pay the balance so settled. *Mulchand Gulabchand v. Girdhar Malhav* (8 Bom. H. C. Rep. A. C. J. 6) followed. *Hargopal Premisukdas v. Abdul Khan Haji Muhammad* 429

ADMINISTRATION OF MINOR'S ESTATE, SUIT FOR—

A suit to compel a minor's guardian, appointed under Act XX. of 1864, to account for his administration of the minor's estate, cannot be properly brought in the Court of a Subordinate Judge or in any Court but in the Principal Civil Court of the District where the property is situate, if it be in one district; but if it be in more districts than one, then in the Principal Civil Court of the district in which the minor has his residence. *Utamráj Mánikál v. Dámódhar-dás Mánikál*39

ADMISSIONS.—*See* SUIT HEARD AND DETERMINED.

AKRIBA, MEANING OF TERM.—*See* WAKF.

ALIENATION OF TALUKDARI VILLAGE.—*See* TALUKDARI VILLAGE.

ALLOWANCE BY GOVERNMENT.—*See* IMMOVEABLE PROPERTY, 2.

ALTERATION OF SENTENCE.—*See* PERSON IN AUTHORITY.

ALTERNATIVE CASE.—

Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease.

A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise.

Where the plaintiff has not put forward an alternative case in the plaint, he may have leave to amend his plaint and to state his

case correctly therein, if the Court think that he has rested his claim upon wrong grounds from mis-information, ignorance of law or fact, mistake or misconstruction of documents. *Lakshmibái v. Hari bin Rávjí.*1

AMENDMENT OF PLAINT.—

See ALTERNATIVE CASE.

APPEAL.—*See* ASSIGNMENT OF DECREE, 2. BOMBAY CIVIL COURTS' ACT (XIV. OF 1869) SEC. 26. NOTES OF EVIDENCE NOT TAKEN. REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT.

APPEAL FROM DECISION OF MAGISTRATE OF DISTRICT.—

See OPIUM SMUGGLED.

APPEAL FROM ORDER IN CHAMBERS.—*See* APPEAL TO PRIVY COUNCIL.

APPEAL TO HIGH COURT FROM CHAMBER ORDER.—*See* APPEAL TO PRIVY COUNCIL.

APPEAL TO PRIVY COUNCIL.—

No appeal lies, under Section 40 of the Amended Letters Patent of the High Court, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, until such judgment or order has been subjected to an appeal to the High Court under Clause 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under Clause 15 is given directly to the Privy Council.

Semble—The High Court will not, in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice, such as an order for the inspection of documents.

Under Clause 15 of the Letters Patent and under the rules of the High Court, an appeal to the High Court from an interlocutory order made by one of its Judges

only lies in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts.—*Sombái v. Ahmedbhái Habibhái and another*. 398

APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI., 1857—

Where one of two arbitrators, appointed under Sec. 10 of Act VI. of 1857, by letter and also verbally authorized his co-arbitrator to appoint a certain person as third arbitrator and the co-arbitrator wrote to the proposed third arbitrator informing him that he had been so appointed:—

Seemle that there was a good appointment "by writing" of the third arbitrator within the meaning of Sec. 12 of Act VI. of 1857.

Where a third arbitrator appointed under Sec. 12 of Act VI. of 1857, considering that his services were required merely as an umpire, though he had due notice of the first meeting, neglected to attend that or any subsequent meetings of the arbitrators and took no part in the making of the award:—

It was held that such non-attendance of the third arbitrator did not render the award a nullity, but was only a ground for setting it aside on the ground of irregularity.

Where an officer, appointed under Act VI. of 1857 to conduct arbitration proceedings on behalf of Government, attended the first two meetings of the arbitrators and did not object to two of the arbitrators proceeding with the reference in the absence of the third arbitrator, and did not attend the subsequent meetings of the arbitrators:—

It was held that Government had thereby waived their right to insist on the non-attendance of the third arbitrator as a ground for setting aside the award.—

Ardesar Hormasji Wadia v. The Secretary of State for India in Council 177

ARBITRATOR.—*See* APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI. OF 1857.

ARREARS, LIMITATION AS TO—
See LIMITATION, 3.

ARREST.—*See* ILLEGAL ARREST.

ARREST, POWER TO, IN OPIUM CASES.—*See* OPIUM LAWS.

ASSIGNEE OF BILL OF LADING FOR VALUE.—*See* BILL OF LADING.

ASSIGNEE OF DECREE.—*See* ASSIGNMENT OF DECREE, 1, 2.

ASSIGNMENT OF DECREE—

1. A person, claiming to be the assignee of a decree, should apply for recognition of his title to the Court which pronounced the decree and for leave under Section 208 of the Civil Procedure Code to have his name substituted in lieu of that of the plaintiff. *Nákodá Ismáíl valad Ahmed Baruchá v. Kássam valad Azam Dupli* 46
2. An order made by a Court recognizing a person as the assignee of a decree is a final order from which a regular appeal may be preferred.

A person claiming to be the assignee of a decree must apply for recognition of his title to the Court which passed the decree, and not to a Court to which such decree has been transmitted for execution. *Frámji Rustamji v. Ratanshá Pestanji and another* 49

ATTACHMENT—

Necessary wearing apparel is not liable to attachment under Sec. 205 of the Code of Civil Procedure. *Gangáram Velji v. Parbhu Dayáram* 272

See DECREE FOR SALE OF IMMOVEABLE PROPERTY.

AWARD—

As proceedings taken to file and enforce an award under Sec. 327 of the Civil Procedure Code are

- of the nature of a suit within the meaning of Sec. 2 of Act XX. of 1864, a minor must be represented in such proceedings by a person holding a certificate of administration. — *Vāsudev Vishnu v. Nārāyan Jagannāth*289
- See APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI. OF 1857.
- BILL OF LADING—**
- A bill of lading purporting to be for 50 tons of coals and containing a printed clause "weight, contents and value unknown" and similar words written above the signature of the Master, does not amount to an admission by the Master that he has received 50 tons of coal on board.
- Upon the true construction of the Bills of Lading Act (IX. of 1856) Sec. 3, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the Master of the shipment of 50 tons.—*W. Nicol and Company v. J. S. Castle*..... 321
- BOMBAY CIVIL COURTS ACT (XIV. OF 1869) SEC. 26—**
- Where a suit, wherein the subject matter exceeded Rs. 5,000, was instituted in the Court of a Principal Sadr Amin, but decided by a Subordinate Judge 1st Class appointed under the Bombay Civil Courts Act XIV. of 1869:—
- It was held* that an appeal lay direct to the High Court under Sec. 26 of the Act.—*Rāyasangji Shivasangji v. Gulām Rasūl and others*.....286
- BREACH OF CONTRACT OF SERVICE—**
- A labourer agreed to serve in consideration of money due from him on account of previous debts. He served for three months only, and then quitted service in violation of the agreement. He was prosecuted and convicted of breach of contract of service under Act XIII. of 1859.
- Held* that he was not liable to be dealt with criminally, because there was no fraudulent breach of contract within the meaning of Act XIII. of 1859, and because, further, no money in advance was received, the consideration for the agreement to serve being an old debt. *Reg. v. Jethya valad Vestya*171
- BREACH OF TRUST.—See LIABILITY OF TRUSTEE FOR BREACH OF TRUST.**
- BRITISH TERRITORIES, LAND OUTSIDE OF.—See JURISDICTION.**
- CALLS, LIABILITY OF INSOLVENT TRADER FOR FUTURE.**
See INSOLVENT TRADER.
- CANCELLATION OF ORDER ADMITTING SPECIAL APPEAL.—**
See REVIEW OF DISTRICT JUDGE'S JUDGMENT AFTER ADMISSION OF SPECIAL APPEAL.
- CAPTURE.—See WARRANT.**
- CASUAL VACANCY.—See MAN-DAMUS.**
- CAUSE OF ACTION—**
1. The contract that the indorser of a *hundi* enters into is to pay the amount of the *hundi* to the holder (in case the drawee makes default) in the place where the *hundi* has been indorsed by him and not in the place where it is made payable.
- Where, therefore, a *hundi* indorsed and delivered in Ajmere was payable in Bombay where it was dishonoured, *it was held* that the cause of action of the holder against the indorser did not arise wholly in Bombay.
- Whether it arose in part in Bombay. *Quære.*—*Suganchand Shivdas and others v. Mulchand Joharimal*. 270
2. H. died at Ajmere, his representative then and at the time of suit brought, being resident there. Previously to the death of H., a cause of action had accrued against him in Bombay:—

- Held* that it was not necessary to obtain the leave of the court under Clause 12 of the Letters Patent, before instituting a suit against H's representative in respect of such cause of action. *Hargopal Premukdas and another v. Abdul Khan Haji Muhammad*429
- See ADJUSTMENT OF ACCOUNTS. LIMITATION, 3. SERVICE WATAN LAND.
- CAUSE OF ACTION, ACCRUAL OF.—See LIMITATION, 2.
- CAUSES OF ACTION, JOINDER OF.—See JOINDER OF DIFFERENT CAUSES OF ACTION.
- CERTIFICATE OF COURT'S SALE.—See REGISTRATION, 3.
- CERTIFICATE OF HEIRSHIP—
A plaintiff, suing as the heir of a deceased person, is (where a certificate of heirship is necessary to enable him to sue), bound to produce the certificate itself. It is not sufficient for the heir to show that an order has been made, directing the issue of such certificate to him.—*Mulchand v. Motichand Hargovandas*37
- CERTIFICATE OF SALE.—See DECREE FOR SALE OF IMMOVEABLE PROPERTY. MORTGAGE WITHOUT POSSESSION, 2.
- CERTIFICATE OF SALE REGISTERED.—See REGISTRATION, 1.
- CHARGE OF DEFAMATION.—See DEFAMATION.
- CHARTER OF THE SUPREME COURT, cl. 28462
- CHEATING.—See OFFENCE NOT CONSTITUTED BY ACTS PROVED.
- CIVIL COURT OF DISTRICT.—See ADMINISTRATION OF MINOR'S ESTATE, SUIT FOR.
- CIVIL PROCEDURE CODE—
SEC. 1243
SEC. 2.—See SUIT HEARD AND DETERMINED.
SEC. 5.—See DECREE FOR SALE OF MORTGAGED PROPERTY OUT OF JURISDICTION.
- SEC. 7.—See JOINDER OF DIFFERENT CAUSES OF ACTION.
- SEC. 17, CL. 2.—See RECOGNISED AGENT.
- SEC. 26 5
SEC. 36 399, 410
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SECS. 76 TO 93 410
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SEC. 119 51, 410
SEC. 138 317
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SEC. 141 204
SEC. 196 8, 11
SEC. 197 9
- SEC. 200.—See RESTITUTION OF CONJUGAL RIGHTS.
- SEC. 205.—See ATTACHMENT.
- SEC. 208.—See ASSIGNMENT OF DECREE, 1.
- SEC. 212... .. 291
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SEC. 246.—See TALUKDARI WATAN 247
- SEC. 256... .. 209
- SECS. 256, 258.—See PURCHASER AT COURT'S SALE.
- SEC. 259.—See DECREE FOR SALE OF IMMOVEABLE PROPERTY ... 206
- SEC. 269 209, 212, 213
- SEC. 273.—See ATTACHMENT.
- SEC. 278... .. 300
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SEC. 284... .. 115
SEC. 294... .. 52
SEC. 327.—See AWARD... 185, 189
SEC. 328 217
SEC. 336 309
SEC. 337 415
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SEC. 366 410
- SECS. 376 and 378.—See REVIEW OF DISTRICT JUDGE'S JUDGMENT AFTER ADMISSION OF SPECIAL APPEAL...91
- COMMITTAL.—See POWER OF SESSION COURT TO DIRECT COMMITTAL.
- COMMON LAW PROCEDURE ACT, 1854 443, 444

COMPANY.—*See* MANDAMUS.

COMPOUND OFFENCE. — *See* HOUSE-BREAKING IN ORDER TO COMMIT THEFT.

CONDITIONAL SALE.—*See* MORTGAGE, 1, 2.

CONFESSION—

A detailed confession made by an accused before a Magistrate, but retracted on the examination being read over to him in conformity with Sec. 205 of the Code of Criminal Procedure, does not amount to a confession, although the plea for retracting the confession, *viz.*, ill-treatment of the accused by the police, may be inquired into and found to be untrue. *Reg. v. Garbad Bechar*344

See PERSON IN AUTHORITY.

CONJUGAL RIGHTS.—*See* RESTITUTION OF CONJUGAL RIGHTS.

CONSENT.—*See* JURISDICTION.

CONSIDERATION.—*See* MUTUALITY.

CONSIGNEE.—*See* BILL OF LADING.

CONSTRUCTION.—*See* BILL OF LADING.

CONTRACT OF SERVICE.—*See* BREACH OF CONTRACT OF SERVICE.

CONTRACT TO SHARE SUMS RECOVERED FROM COMMON DEBTOR.—*See* MUTUALITY.

CONVICTION OF ACTING POUND-KEEPER.—*See* POUND-KEEPER.

COSTS AS BETWEEN PLEADER AND CLIENT—

The provisions of Regulation II. of 1827, Sec. 52, clauses 1 and 2, and of Act I. of 1846, Sec. 7, regarding the award of pleader's costs by way of a percentage, relate only to costs as between party and party, and (inasmuch as Sec. 52 of Regulation II. of 1827 is, by Sec. 6 of Act I. of 1846, expressly rendered inoperative for any purpose except for the purposes of Sec. 7 of the latter Act) there is not any statutable provision for costs as between pleader and client,

so that, in the absence of an agreement between them, the pleader left to his remedy on a *quantum meruit*.—*Gangji Vithal v. Sitaram Shridhar*33

CREDITOR, REFUND OF PURCHASE MONEY BY.—*See* PURCHASER AT COURT'S SALE.

CREDITOR'S RIGHT TO FOLLOW ASSETS OF A DECEASED HINDU INTO THE HANDS OF A PURCHASER FOR VALUE—

Under the Hindu Law, the property of a deceased Hindu is not so hypothecated, for his debts, as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it into the hands of a person who has purchased it from the heir of the deceased in good faith and for valuable consideration.—*Sunbussapa v. Moodkapa and Naroo-Huree v. Konbeir Munohur* followed. *Jamiyatram Ramchandra v. Parbhudas Hathi* 116

CRIMINAL PROCEDURE CODE—

SEC. 21.—*See* OPIUM LAWS. OPIUM SMUGGLED.

SEC. 22 343

SEC. 33.—*See* VIOLATION OF CONDITIONS OF REMISSION OF PUNISHMENT.

SEC. 62... .. 266

SECS. 76 AND 84.—*See* WARRANT.

SEC. 100 ... 347, 348, 349, 351, 353

SEC. 101 348

SEC. 108.—*See* OPIUM LAWS ... 349

SEC. 140 348, 353

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SEC. 205.—*See* CONFESSION.

SEC. 225... .. 170, 347, 350

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SEC. 255.—*See* POWER OF SESSION COURT TO DIRECT COMMITTAL.

SEC. 273 168

SEC. 308.—*See* JUDICIAL PROCEEDING.

SEC. 404.—*See* JUDICIAL PROCEEDING 174

- SEC. 409.—*See* OPIUM SMUGGLED.
 SEC. 434 ... 164, 165, 167, 346, 350, 352, 356.
 SEC. 435.—*See* POWER OF DISTRICT MAGISTRATE TO DIRECT RE-TRIAL.
 POWER OF SESSION COURT TO DIRECT COMMITTAL ... 350
 CHAPTER XX. ... 163
 SCHEDULE ... 357
 CULTIVATOR OF KHOTI LAND.
 —*See* KHOTI LAND.
 CURD-POT, SUIT TO ESTABLISH RIGHT TO BREAK—
 Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a particular part of the temple of Shri Vithobá and Tukarám at Dehu :—
It was held that the defendants breaking their own curd-pot on that day in any part of that temple, was a violation of that right, entitling the plaintiff to damages.—*Narayan Saddanand Bává v. Bálkrishna Shidheshvar and others* ... 413
 DAHI HANDI CEREMONY.—*See* CURD-POT, SUIT TO ESTABLISH RIGHT TO BREAK.
 DAMDUPAT.—*See* INTEREST EXCEEDING PRINCIPAL.
 DEBTS OF DECEASED HINDU.
 —*See* CREDITOR'S RIGHT TO FOLLOW ASSETS OF A DECEASED HINDU INTO THE HANDS OF A PURCHASER FOR VALUE.
 DECISION BY DEFAULT.—*See* TA'LUKDA'RI VILLAGE.
 DECREE, ASSIGNMENT OF.—*See* ASSIGNMENT OF DECREE, 1, 2.
 DECREE BY SUBORDINATE JUDGE.—*See* BOMBAY CIVIL COURTS ACT (XIV. OF 1869) SEC. 26.
 DECREE, EXECUTION OF.—*See* EXECUTION OF DECREE, 2. RESTITUTION OF CONJUGAL RIGHTS.
 DECREE FOR SALE OF IMMOVEABLE PROPERTY—
 A decree for the sale of mortgaged property was attached and sold in execution of a decree. *Held* that

- the interest in immoveable property thereunder conveyed to the purchaser was immoveable property within the meaning of Sec. 259 of Act VIII. of 1859, and that a certificate of sale ought to have been granted to the purchaser.—*Hari Govind Joshi v. Rámchandra Pándurang Joshi* ... 64
 DECREE FOR SALE OF MORTGAGED PROPERTY OUT OF JURISDICTION—
 A suit for the recovery of a mortgage debt by the sale of the mortgaged property, is not a suit for land, within the meaning of Sec. 5 of the Code of Civil Procedure.
 A Court may decree the sale of mortgaged immoveable property, though situate beyond its jurisdiction.—*Yenkobá Bálsbet Kásár v. Rambháji valad Arjun* ... 12
 DECREE PASSED BY PRINCIPAL SADR AMIN.—*See* EXECUTION OF DECREE, 1.
 DEED OF SALE UNREGISTERED.—*See* REGISTRATION, 1.
 DEED OF SALE WITHOUT POSSESSION.—*See* REGISTRATION, 3.
 DEFAMATION—
 In framing a charge of defamation under Act XXV. of 1861, it is not necessary to negative the exceptions contained in Sec. 499 of the Indian Penal Code.
 It is not an error in law for a Judge to require a person accused of defamation to prove the several distinct imputations contained in a libellous article published by him, with the same strictness with which he would be required to prove them, if he were the defendant in a civil action.
 The High Court, as a court of revision, cannot interfere with the findings of the lower appellate court on questions as to the truth of the allegations contained in a libel or the *bona fides* of the accused, but upon such questions are bound by the findings of the lower court. *Reg. v. Kílábháí Parbhulá* ... 451

DIRECTOR'S RIGHT ENFORCED BY MANDAMUS.—*See* MANDAMUS.

DISCHARGE (FINAL) OF TRADER.—*See* INSOLVENT TRADER.

DISCHARGE (PERSONAL) UNDER SEC. 47 OF INSOLVENT ACT.—*See* INSOLVENT ACT, SECS. 47, 50, AND 60.

DISCHARGE OF INSOLVENT.—*See* REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT.

DISCOVERY OF NEW MATTER.—*See* REVIEW OF JUDGMENT.

DISCRETION.—*See* APPEAL TO PRIVY COUNCIL.

DISPOSSESSION OF MORTGAGEE.—*See* LIMITATION, 1.

EJECTMENT.—*See* ALTERNATIVE CASE.

ENGLISH COMPANIES ACT OF 1862 29,30,31,32

EUROPEAN BRITISH BORN SUBJECT.—*See* INSOLVENCY.

EVIDENCE.—*See* CONFESSION. INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY. INSOLVENT ACT, SECS. 47, 50, AND 60.

EVIDENCE IMPROPERLY ADMITTED.—*See* PERSON IN AUTHORITY.

EVIDENCE IN INSOLVENT COURT.—*See* NOTES OF EVIDENCE NOT TAKEN.

EXECUTION.—*See* PURCHASER AT COURT'S SALE.

EXECUTION, APPLICATION FOR.—*See* ASSIGNMENT OF DECREE, 1, 2.

EXECUTION CREDITOR LIABLE IN DAMAGES TO TRUE OWNER FOR WRONGFUL SALE.—*See* PURCHASER AT COURT'S SALE.

EXECUTION OF DECREE—

1. A decree passed by a Principal Sadr Amin of the district of North Kanara before that district was transferred to the Bombay Presidency, should be executed by the First Class Subordinate Judge

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who has succeeded to the Court and functions of such Principal Sadr Amin, and cannot by him be delegated for execution by a Second Class Subordinate Judge though the amount of such decree be less than Rs. 5,000.

The provision in the Bombay Courts' Act (XIV. of 1869), that in suits under Rs. 5,000 the Second Class Subordinate Judges only shall have jurisdiction, does not affect the execution of decrees passed before that Act came into force. *Pirjádá Nasarudin v. Venkat Prabhu* 113

2. On the 26th June 1867, a decree-holder applied for execution of his decree. A notice was thereupon issued to the judgment debtor to show cause on the 13th July 1867 why the decree should not be executed against him. The judgment debtor not appearing to show cause on the 13th July 1867, the Subordinate Judge of Surat ordered a warrant to be issued. Subsequently on the same day (13th July 1867), the decree-holder applied to the Court to stop all further proceedings in the case, on the ground that the judgment debtor had promised to satisfy the decree. The decree, however, remaining unsatisfied, the judgment creditor, on the 12th July 1870, presented a second application for execution. The Subordinate Judge rejected it as barred under Sec. 20 of Act XIV. of 1859, as it was beyond three years from the 26th June 1867, the date of the previous application. In Appeal, the District Judge confirmed the order.

On special appeal, the High Court reversed the orders of both the lower courts and held the proceedings to have commenced on the 26th June 1867 and continued till the 13th July 1867 on which day the judgment debtor was to show

- cause, and up to which day, therefore, the judgment creditor must be considered as going on with one and the same proceeding, as the first court actually made an order for a warrant to issue on that day. *Dāmodhar Lakshmīlās v. Gulabāīs Lālbhāī* 254
- See* RESTITUTION OF CONJUGAL RIGHTS.
- EXTRAORDINARY CRIMINAL JURISDICTION.**—*See* JUDICIAL PROCEEDING.
- EXTRAORDINARY JURISDICTION OF HIGH COURT.**—
- Distinction between the High Court's Extraordinary Jurisdiction under Cl. 2 of Sec. 5 of Reg. II. of 1827, and its general power of superintendence, under Section 15 of Stat. 24 and 25 Vict. Chap. 104, pointed out, and the occasion for the exercise of the former stated.
- The Mamlatdars' Courts, constituted under Bombay Act V. of 1864, are Subordinate Civil Courts within the meaning of Cl. 2, Sec. 5, Reg. II. of 1827. The High Court has, therefore, power, in the exercise of its Extraordinary Jurisdiction, to set aside an order made by a Mamlatdar under Bombay Act V. of 1864. *Mahādāji Govind v. Sonu bin Davlatā* 249
- See* MAINTENANCE OF DESERTED WIFE.
- FEES OF HEREDITARY OFFICE.**
See IMMOVEABLE PROPERTY, 1.
- FORECLOSURE SUIT.**—*See* LIMITATION, 1.
- FOREIGN TERRITORIES, LAND IN.**—*See* JURISDICTION.
- FOUNDER'S RIGHT TO APPOINT MANAGER OF WAKF.**—*See* WAKF.
- FRESH STARTING-POINT.**—*See* ADJUSTMENT OF ACCOUNTS.
- FULL POWER MAGISTRATE.**—*See* REFERENCE OF CASE TO MAGISTRATE F.P. BY SUBORDINATE MAGISTRATE.
- GAHA'N LAHA'N CLAUSE.**—*See* MORTGAGE, 1.
- GAHA'N LAHA'N MORTGAGE.**—*See* MORTGAGE, 2.
- GOVERNMENT OFFICER, REFUSAL OF CART TO.**—*See* PUBLIC SERVANT.
- GUARDIAN OF MINOR.**—*See* ADMINISTRATION OF MINOR'S ESTATE, SUIT FOR.
- HABEAS CORPUS.**—*See* WARRANT.
- HEIRSHIP, CERTIFICATE OF.**—*See* CERTIFICATE OF HEIRSHIP.
- HEREDITARY OFFICE, ALLOWANCE NOT INCIDENTAL TO.**—*See* IMMOVEABLE PROPERTY, 2.
- HEREDITARY OFFICE, FEES OF.**—*See* IMMOVEABLE PROPERTY, 1.
- HIGH COURT.**—*See* NOTES OF EVIDENCE NOT TAKEN.
- HIGH COURT AS A COURT OF REVISION, POWERS OF.**—*See* DEFAMATION.
- HIGH COURT RULES** 403
- HINDU LAW.**—*See* CREDITOR'S RIGHT TO FOLLOW ASSETS OF A DECEASED HINDU INTO THE HANDS OF A PURCHASER FOR VALUE. IMMOVEABLE PROPERTY, 1, 2. INTEREST EXCEEDING PRINCIPAL. MAINTENANCE OF DESERTED WIFE. MORTGAGE WITHOUT POSSESSION, 1, 2.
- HOUSE-BREAKING IN ORDER TO COMMIT THEFT.**—
- It is competent to a Magistrate to pass a separate sentence in respect of each of the two charges, of house-breaking in order to commit theft, and of theft in a human dwelling, of which prisoner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided, further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentences. *Reg. v. Anvarkhān valad Gulkhān and another* 172

HUNDI.—See CAUSE OF ACTION, 1.

ILLEGAL ARREST—

Proof of an unlawful commitment to confinement, will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of Sec. 220 of the Indian Penal Code. *Reg. v. Nārāyan Bābaji and others* 346

IMMOVEABLE PROPERTY—

1. The cl. of the Limitation Act (No. XIV. of 1859) which is applicable to a suit to recover fees payable to the incumbent of an hereditary office such as that of a village Joshi is Cl. 12, and not Cl. 16, of Sec. I. of that Act. *Krishnabhat v. Kapābhat* followed.

The meaning of the term immoveable property as used with regard to Hindu law, discussed. *Balvantrāy Bāpaji v. Purshotam Sidheshvar and another* 99

2. In considering with reference to prescription whether an allowance (not being incidental to an hereditary office) is or is not immoveable property, the High Court has generally followed the test:—"Is or is not the allowance a charge upon land or other immoveable property?"

Where an allowance by Government is neither incidental to an hereditary office nor a charge upon immoveable property and is not supported by a grant from Government, the enjoyment of it for thirty years does not create a prescriptive title to its continuance under Regulation V. of 1827, Section I., Cl. I. *The Government of Bombay v. Gosvāmi Shiri Gir-dharlalji* 222

See DECREE FOR SALE OF IMMOVEABLE PROPERTY.

IMPLIED CONTRACTS.—See LIMITATION, 4.

IMPRISONMENT OF INSOLVENT.

—See INSOLVENT ACT, SECS. 47, 50 AND 60.

INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY—

A sequestration by the officers of the British Government of the private property of the Angria of Kolaba—a Native independent Sovereign—though made contrary to the express orders of the Court of Directors originally given, would not be liable to question in a Municipal Court if subsequently ratified, but *aliter* where there is no such ratification. *Mir Zulef Ali v. Yeshvaddābī Sāheb* 314

INDIAN EVIDENCE ACT.—See ACT I. OF 1872.

INDIAN PENAL CODE—

SEC. 52	460
SEC. 71	173
SEC. 81	349, 350
SEC. 100	296
SEC. 186—See PUBLIC SERVANT.	
SEC. 188	168
SEC. 220—See ILLEGAL ARREST.	
SEC. 227—See VIOLATION OF CONDITIONS OF REMISSION OF PUNISHMENT.	
SEC. 323	169
SEC. 348	347, 350
SEC. 380—See HOUSEBREAKING IN ORDER TO COMMIT THEFT.	
SEC. 417—See OFFENCE NOT CONSTITUTED BY ACTS PROVED.	
SEC. 426	167
SEC. 457—See HOUSE-BREAKING IN ORDER TO COMMIT THEFT.	
SEC. 499—See DEFAMATION.	
SEC. 500	170

INDORSER OF HUNDI, ACTION AGAINST.—See CAUSE OF ACTION, 1.

INDUCEMENT.—See PERSON IN AUTHORITY.

INFERIOR COURTS.—See EXTRAORDINARY JURISDICTION OF HIGH COURT.

INFRINGEMENT OF RIGHT.—See CURD POT, SUIT TO ESTABLISH RIGHT TO BREAK.

INSOLVENCY—

A European British born subject residing in the Bombay Presidency but outside the local limits of the jurisdiction of the High Court, is entitled to come to Bombay and present a petition in the Court for the Relief of Insolvent Debtors and obtain the benefit of the Indian Insolvent Act, as the original jurisdiction of the Supreme Court is, in that respect, continued to the High Court by Clause 18 of its Letters Patent. *In re George Blackwell*.....461

INSOLVENT ACT, SECTIONS 47, 50, AND 60—

An insolvent, whose personal discharge has been opposed under Sec. 47 of the Indian Insolvent Act, can be again opposed by the same creditor, and on the same grounds, when he applies for an absolute discharge under Sec. 60.

The order made on the hearing of the petition under Sec. 47 of the Act can be used as evidence against the insolvent when applying for his discharge under Sec. 60, provided that such order clearly states the offences established against the insolvent.

An insolvent by being punished under Sec. 50 of the Act does not thereby cease to be liable in respect of such offences when he applies for his discharge under the 60th Section.

The discharge under Sec. 60 of an insolvent who has already obtained his discharge under Sec. 47, is not as of course, but will depend upon the general conduct of the insolvent both before and subsequent to his obtaining his discharge under Sec. 47. *In re N. D. Coorlawalla*.....14

INSOLVENT COURT.—See NOTES OF EVIDENCE NOT TAKEN. REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT.

INSOLVENT TRADER—

An Insolvent Trader, who has obtained his discharge under Sec. 24 of Act XXVIII. of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a Joint Stock Company, when the order for the winding up of such Company has been made prior to the time of the Insolvent Trader obtaining his discharge. *J. F. Punnett v. Vinayak Pandurang*..27

INSPECTION OF DOCUMENTS, ORDER FOR.—See APPEAL TO PRIVY COUNCIL.

INTENTION.—See ILLEGAL ARREST.

INTEREST ON MESNE PROFITS, —See MESNE PROFITS.

INTEREST EXCEEDING PRINCIPAL—

According to the Hindu law of *dāmdupat*, interest exceeding the principal sum lent cannot be recovered at any one time.

Cases bearing upon the subject of *dāmdupat*, and how far and when that law is applicable to loans upon mortgage, reviewed and considered. *Nārāyan and others v. Satvāji and others*83

INTERLOCUTORY JUDGMENT. —See APPEAL TO PRIVY COUNCIL.

IRREGULARITY.—See APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI. OF 1857.

JOINDER OF DIFFERENT CAUSES OF ACTION—

In 1869, P. brought a suit against his grandmother K. and another person, for possession of a piece of land which P. alleged had descended to him from his grandfather. In 1870, P. sued the said K. and one E. for some trees which he also claimed by right of inheritance from his grandfather.

Held that the causes of action in the two suits by P. were different, viz., unlawful alienations by K. of the

respective properties, the subject matter of the different suits.

Sec. 7, Civ. Proc. Code requires that every suit should include the whole of the claim, arising from the same cause of action, but although the Civil Procedure allows of claims, arising from different causes of action, being included in the same plaint, there is no provision of law which makes it obligatory on the plaintiff to do so. *Práji Rudarji v. Endarji Bhimbhai*.....257

JUDGMENT NOT INTER PARTES.

See MORTGAGE WITHOUT POSSESSION, 1.

JUDICIAL PROCEEDING—

An order under Section 308 of the Code of Criminal Procedure is a judicial proceeding within the meaning of Section 404 of that Code and is, therefore, open to review by the High Court under its extraordinary jurisdiction, when an error in law is committed. *Ashburner v. Keshav* on the point overruled, and *The Collector of Hoogly v. Tara Nath Mukhopadhyaya* followed. *Ganprasad bin Sobharām*.....160.

JURISDICTION—

The Raja of Dangadra—an independent Chief—sued the Government of Bombay for a village which he described in the plaint as situated in the Raja's own territory. The District Judge of Ahmedabad rejected the suit for want of jurisdiction, as the village in dispute was beyond the British territories. On appeal, the High Court remanded the case for retrial on the merits on the agreement by the plaintiff that he would so amend the plaint as to bring the suit within the jurisdiction of the Ahmedabad District Court. The plaint was accordingly amended, and the District Court decided the case on the merits in favour of the plaintiff. The High Court, how-

ever, finding that the amendment did not alter the original statement in the plaint regarding the situation of the village, and finding that the plaintiff's evidence and arguments were directed solely to prove that the village was not in British but foreign territory, annulled the decree, although both the parties expressed their willingness that the appeal should be decided on the merits, the court acting on the rule of law that no consent of parties can give to the court a jurisdiction which it does not possess over the subject matter of the suit. *The Government of Bombay v. Ramnalsingji Amarsingji*242

See ADMINISTRATION OF MINOR'S ESTATE, SUIT FOR. BOMBAY CIVIL COURTS' ACT (XIV. OF 1869) SEC. 26. CAUSE OF ACTION, 1. DECREE FOR SALE OF MORTGAGED PROPERTY OUT OF JURISDICTION. EXECUTION OF DECREE, 1. INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY. INSOLVENCY. MAINTENANCE OF DESERTED WIFE. MANDAMUS. OPIUM LAWS. VIOLATION OF CONDITIONS OF REMISSION OF PUNISHMENT.

JURISDICTION OF SMALL CAUSE COURT.—See SMALL CAUSE COURT.

JURISDICTION TO HEAR APPEAL.—See NOTES OF EVIDENCE NOT TAKEN.

KABULAYATDAR.—See KHOTI LAND.

KANARA, NORTH.—See EXECUTION OF DECREE, 1.

KEEPING ALIVE DECREE.—See EXECUTION OF DECREE, 2.

KHOT.—See KHOTI LAND.

KHOTI LAND—

In a suit by a *Kabulayatdar* Khot for rent from cultivators holding land in a Khoti village, the *onus* does not lie on the plaintiff to prove the land to be Khoti; but the holder of land in a Khoti estate must prove that he is ex-

- empowerment for the purpose of
to the extent of the equity
SP. APP. NO. 45 of 1868 followed
Mahomed Yousuf v. Mahomed
Iskander and others..... 275
- LABOURER.—See BREACH OF CON-
TRACT OF SERVICE.
- LANDLORD. EJECTMENT SUIT
BY.—See ALTERNATIVE CASE.
- LANDLORD AND TENANT.—See
REGISTRATION, 4.
- LAND SITUATED BEYOND
BRITISH TERRITORIES.—See
JURISDICTION.
- LAND, SUIT TO RECOVER.—See
LIMITATION, 2. MORTGAGE WITHOUT
POSSESSION, 1.
- LEASE, FAILURE TO PROVE.—
See ALTERNATIVE CASE.
- LEAVE OF COURT TO SUE.—See
CAUSE OF ACTION, 2.
- LETTERS PATENT OF HIGH
COURT OF BOMBAY (1862)—
CL. 14 406, 407, 409, 410
CL. 18 403
CL. 21 380
CL. 22, 24 and 25 381
- LETTERS PATENT OF HIGH
COURT OF BOMBAY, AMENDED
(1865)—
CL. 12.—See CAUSE OF ACTION, 1, 2.
CL. 15.—See APPEAL TO PRIVY COUN-
CIL 205, 212.
CL. 18.—See INSOLVENCY.
CL. 19 403
CL. 25 359, 364, 365, 384,
391.
CL. 26.—See PERSON IN AUTHORITY.
CL. 37 406, 407, 408, 411,
SEC. 38 371, 375, 391, 392.
SEC. 39 409
SEC. 40.—See APPEAL TO PRIVY
COUNCIL.
SEC. 41 403
- LEX REI SITÆ 101, 103
- LIABILITY OF TRUSTEE FOR
BREACH OF TRUST—
A trustee, who, having accepted a
trust, remains passive and takes
no steps to see the trust carried
- into effect, is liable for losses
arising from the breach of trust of
his co-trustee. *B. J. M. v.*
T. J. M. J. M. and
others 333
- LIFE TENANTS.—See SERVICE
WATAN LAND.
- LIMITATION—
1. The plaintiff, on the 2nd of
August 1847, became mortgagee of
a house under an instrument
of mortgage, which provided
that, in default of payment by the
mortgagor of the mortgage loan
within five years, the house should
be considered as absolutely sold
to the mortgagee. Default was
made in payment, and the mort-
gagee entered into possession, and
continued in possession until 1858
when he was dispossessed by the
mortgagor. On the 29th March
1866 the plaintiff filed a suit, in
the nature of a foreclosure suit,
against his mortgagor, to which
the defendant pleaded the law of
limitation.
Held that the plaintiff's cause of ac-
tion arose in 1858, when he was
dispossessed by the defendant, and
that he had under Act XIV. of
1859, Sec. I., Cl. 12, twelve years
from that date within which to
file his suit. *Lakshmidai v. Vitthal*
Ramchandra 53
2. A suit to recover possession of
an unenclosed piece of ground
must be brought within twelve
years from the time the cause of
action accrued, and in deciding
this the issue is, not that the
plaintiff must show that he exer-
cised some right of ownership over
the ground within the twelve years
preceding the filing of the action,
but that twelve years have not
elapsed between the day the defen-
dant interfered with the plaintiff's
possession and the date on which
the plaintiff filed his claim. *Sagan-*
gowda bin Basangowda v. Basap-
bin Chendapa 62

3. Where there has been no recognition of title nor any payment of dues within the period of limitation prescribed by law, there is a sufficient bar to the claimant's right to recover, if he ever had any.

The cause of action to establish title and the cause of action to recover arrears which rest on such title are not distinct and independent of each other; so that if the former be barred, even those arrears, which may be within the law of limitations, cannot be recovered. *Madvalá bin Gindrá v. Bhagwantá bin Derji*..... 260

4. Where the defendant employed the plaintiff to repair a bungalow, but no express agreement was come to as to the payment for the repairs, it was held that on the performance of the repairs an implied contract to pay their fair value arose, for which the period of limitation was six years, as ruled in *Umedchand Hukamchand v. Shá Bulakidás Lalchand. Naro Ganesh Dátár v. Muhammad Khán*. 280

See ADJUSTMENT OF ACCOUNTS. EXECUTION OF DECREE 2. IMMOVABLE PROPERTY, 1. MAMLATDAR'S ORDER, SUIT TO SET ASIDE. MORTGAGE, 2.

MAINTENANCE OF DESERTED WIFE—

Although the relations of the husband of a Hindu woman, deserted by him, may not be under a personal liability to support her, yet, if they have property of the husband in their hands, his wife is entitled to be maintained out of the husband's estate to the extent of the proceeds of one-third thereof.

Whether a suit to obtain such maintenance is cognizable by a Court of Small Causes. *Quære*.

Where there has been a manifest error of law, and to prevent manifest injustice, the High Court,

in the exercise of its extraordinary jurisdiction, will remand a case to the Lower Court, though the value of the claim may be under Rs. 500, and the case may be one in which a special appeal is not allowed. *Ramábdi v. Trimbak Ganesh Desái and another*.....283

MALICE.—See ILLEGAL ARREST.

MAMLATDAR'S COURT—See EXTRAORDINARY JURISDICTION OF HIGH COURT.

MAMLATDAR'S ORDER AGAINST MORTGAGOR. — See MORTGAGE WITHOUT POSSESSION, 1.

MAMLATDAR'S ORDER, SUIT TO SET ASIDE—

A brought a suit in a Mámlatdár's Court under Bombay Act V. of 1864, to recover possession of certain land from B. C. joined in the proceedings *proprio motu*, and the Mámlatdár, on the 1st May 1865, made an order, awarding possession of the land to C. In an action brought by A against C in the Civil Court on the 18th October 1869, C. pleaded limitation under Sec. 1, Cl. 7, Act XIV. of 1859, as the action was not filed within three years, of the Mámlatdár's order.

Held that the action was not barred by limitation, as C. was not properly a defendant in the Mámlatdár's Court, and that, therefore, the Mámlatdár had no power to make an order regarding him. *Vishvanáthráv Kacheshvar v. Náráyan bin Gopál*424

MANAGER OF WAKF.—See WAKF.

MANDAMUS—

The High Court has jurisdiction to enforce by Mandamus the right of persons duly elected Directors of a Joint-Stock Company to exercise the functions of Directors of such Company, if such rights interfered with by the Company acting through its other Directors.

Seemle that the Court will not refuse to interfere by *Mandamus* in such a case merely, because the office of a Director is not a permanent office, or because a Director can be removed from his office by a special resolution of the shareholders, but in a proper case, will restore him to his legal position.

Meaning of the words "casual vacancy" considered. *In re The Albert Mills Company; Nasarvánji Aspándiárji and others v. Shivji Mánikbhái and others* 438

MASTER, ACTION AGAINST.—*See* BILL OF LADING.

MAXIMS—

A FRONTE PRÆCIPITIUM, A TERGO LUPI 355
 CAVEAT EMPTOR 97
 EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. 313, 336.
 QUIA EXPEDIT REIPUBLICÆ UT SIT FINIS LITIIUM 191
 UT RES MAGIS VALEAT QUAM PEREAT. 191

MESNE PROFITS—

In a suit for mesne profits (not being a suit for land and its mesne profits) interest on mesne profits cannot be recovered. *Chaku Modan Isárá v. Dullabh Dwáráká*. 7

MINOR.—*See* ADMINISTRATION OF MINOR'S ESTATE, SUIT FOR. AWARD. NEXT FRIEND OF MINOR, SUIT BY.

MISCONDUCT OF ARBITRATOR.—*See* APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI. OF 1857.

MISDESCRIPTION OF DOCUMENT.—*See* SUIT HEARD AND DETERMINED.

MISTAKE IN FRAMING PLAINT.—*See* ALTERNATIVE CASE.

MORTGAGE—

1. Since the decision of the case of *Ramji v. Chinto*, it has been the practice of the High Court on its appellate side and of the inferior Courts in the Bombay Presidency to treat *gahán lahán* mortgages

(mortgages containing a proviso that if not redeemed within a certain fixed time they will be considered as converted into absolute sales) as redeemable, notwithstanding that such fixed time has expired—Such practice has proved beneficial and should be adhered to.

Ramji v. Chinto and the cases decided in accordance with it, referred to and followed. *Shankarbhai Gulibbhái and others v. Kásibhái Vithalbhái* 69.

2. Redemption by the mortgagor of mortgaged premises held by a mortgagee under a *gahán lahán* mortgage is not barred by the mortgagee's possession of the premises for the period of twelve years after the date on which according to the terms of the mortgage deed, the mortgage is to be converted into a sale. Such a case is governed by the provisions of Act XIV. of 1859 Sec. I Cl. 15. *Krishnáji alias Báráji Keshav v. Ráráji Sudashiv and another*.

See LIMITATION, 1. 79

MORTGAGE BY HINDU.—*See* INTEREST EXCEEDING PRINCIPAL.

MORTGAGE, SUIT ON.—*See* DECREE FOR SALE OF MORTGAGED PROPERTY OUT OF JURISDICTION.

MORTGAGE, REGISTERED, WITHOUT POSSESSION.—*See* REGISTRATION, 2.

MORTGAGE WITHOUT POSSESSION—

1. In order that a Hindu mortgagee may successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. He can bring his action based upon the title of his mortgagor, if the mortgagor had a good title to the land, and was in possession of it within twelve years before the suit was brought.

A mortgagee is not affected by a Māmlatdār's order, made under Bombay Act V. 1864, on the application of the mortgagor for possession subsequent to the date of the mortgage. *Krishndji Narāyan v. Govind Bhāskar and others*..... 275.

2. A mortgage without possession is not, in Hindu law, absolutely invalid but is binding as between the mortgagor and mortgagee.

A purchaser with possession at a Court's sale, whose certificate of sale is registered, buys the right, title and interest of the debtor, burdened with the lien of a prior mortgage, without possession whose deed of mortgage is registered. *Chintāman Bhāskar v. Shivram Hari and others* 304.

MUHAMMADAN LAW.—See WAKF.

MUNICIPAL GROUND RATES—

The Great Indian Peninsula Railway Company, which, under an agreement with Government, holds the land, upon which their Railway is constructed, free of rent for 99 years, are occupiers only, and not owners, of such land within the meaning of Section 2 of Bombay Act II. of 1865, and are therefore not liable to be rated as owners of the ground used by them for the purposes of the railway within the City of Bombay.

Principles upon which railway companies are liable to be rated considered and laid down. *The Justices of the Peace for the City of Bombay v. The Great Indian Peninsula Railway Company* 217

MUNIM WINDING UP FIRM.—See RECOGNIZED AGENT.

MUSIC IN PRIVATE HOUSE.—See POLICE PROHIBITION.

MUTUALITY—

An agreement whereby the defendant undertook to pay to the plaintiff and two other co-creditors

of an insolvent a share in any sums which he might recover from the insolvent in consideration of receiving a share in any sums which might be recovered by the other creditors is not, though the plaintiff has passed no similar agreement in favour of the defendant, invalid for want of consideration or mutuality of obligation.

Where, however, one of the persons in whose favour the agreement was passed, without making the others parties sued the person who executed it to recover his share, it was held that the suit was not maintainable, as it could only be brought as a suit between partners for an account and the results of all the partnership transactions must be brought at once under the view of the Court. *Bhagtidās Bhagrándās v. N. R. Oliver* ... 418

NEW MATTER SHOWING WANT OF JURISDICTION.—See REVIEW OF JUDGMENT.

NEXT FRIEND OF MINOR, SUIT BY—

There is nothing in the Minors Act (XX. of 1864) to prevent the institution of a suit by the next friend of a minor who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the Principal Civil Court of the District.

As the right, however, of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minor's Act, by Sec. 3—7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his estate, the proper course

for a Court, to which a plaint on behalf of a minor is presented by his friend, is either to refuse to accept the plaint, when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint and stay proceedings until the plaintiff has duly obtained a certificate under the Act. *Vijkor v. Jijibhai Vaji*130

NORTH KANARA.—See EXECUTION OF DECREE, 1.

NOTES OF EVIDENCE NOT TAKEN—

In order to enable the High Court to hear the appeal of an opposing creditor from an order made upon the hearing of an insolvent's petition which such creditor opposes (and upon which evidence is taken), it is necessary that notes of all the evidence at the hearings should be recorded by an officer of the Insolvent Court.

In re Lakshmidas Hansraj in substance followed. *Kallindas Kirpdrām v. Trikamlal Gulabrai*.307

NOTICE.—See MORTGAGE WITHOUT POSSESSION, 2.

NUISANCE, REMOVAL OF.—See JUDICIAL PROCEEDING.

NUL TIEL AGARD ...185, 195, 196, 198, 199, 200, 201.

OBSTRUCTING PUBLIC SERVANT.—See PUBLIC SERVANT.

OCCUPIER.—See MUNICIPAL GROUND RATES.

OFFENCE NOT CONSTITUTED BY ACTS PROVED—

Where the High Court was of opinion (in a case in which no appeal lay to it) that the facts found by the Court that tried the prisoners and the Court of appeal from such Court did not constitute the offence of cheating of which the prisoners had been convicted, the High Court, in the

exercise of its extraordinary jurisdiction, reversed the conviction and sentence.

To justify a conviction for the offence of cheating there must be some evidence of an intention to cheat at the time when the promise (the omission to perform which completes the offence of cheating) is made. *Reg. v. Hargovandas and Harkisundas*448.

ONUS OF PROOF.—See KHOTI LAND.

OPEN GROUND.—See LIMITATION, 2.

OPENING NEW WINDOWS.—See PRIVACY, INVASION OF.

OPIUM LAWS—

The District Magistrate (whose Court is the proper tribunal for the trial of an offence relating to the smuggling of opium) has, under Section 21 of the Code of Criminal Procedure, power to inflict any fine provided by Regulation XXI. of 1827 for such offence, even though the fine may exceed Rs. 1,000.

The arrest of a person accused of the above offence without a warrant is generally illegal, except under the circumstances specified in Sec. 108 of the Code of Criminal Procedure. *Reg. v. Narayan Gangdrām and others*343

OPIUM SMUGGLED—

Although the effect of Section 21 of the Code of Criminal Procedure is to give exclusive original jurisdiction to the Magistrate of the District in the trial of cases under Section 7 of Regulation XXI. of 1827 for abetting the smuggling of opium, that Section (21) does not exclude the appellate jurisdiction vested in the Court of Session by Section 409 of the Code. *Reg. v. Sadu Dhadabhai*166

OPPOSITION TO DISCHARGE OF INSOLVENT.—See INSOLVENT ACT, SECS. 47, 50, AND 60.

OWNER.—*See* MUNICIPAL GROUND RATES.

PARSI MARRIAGE AND DIVORCE ACT.—*See* RESTITUTION OF CONJUGAL RIGHTS.

PERSON IN AUTHORITY.—

W., a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the account of the prisoner, who was a booking clerk of the Company, went to him and told him that "he had better pay the money than go to jail" and added that "it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rs. 826-8-0. The prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of this and of other sums:—

Held that the words used by W., the travelling auditor, constituted an inducement to the prisoner to confess, and that W. was a person in authority within the meaning of Section 24 of the Indian Evidence Act, and that the receipt signed by the prisoner was, therefore, not admissible in evidence on his trial.

Held also (Bayley, J., *dissentiente*) that the High Court, in considering a point of law reserved under Cl. 26 of the Letters Patent, where it is of opinion that evidence has been improperly admitted as to one of two heads of charge of which a prisoner stands convicted (the two heads of charge relating to distinct and separate offences) and that the conviction on such head of charge is bad, has power to review the whole case and, if it appears that the evidence improperly admitted could not reasonably be supposed to have influenced the jury as to the latter head of charge, ought not to set

aside the conviction on that head of charge but should proceed to pass judgment and sentence on it. *Semble.* Sec. 167 of the Indian Evidence Act applies to criminal trials by jury in the High Court. *Reg. v. Navroji Daddabhai* 358.

PLAINT.—*See* ALTERNATIVE CASE.

PLEADER'S COSTS.—*See* COSTS AS BETWEEN PLEADER AND CLIENT.

POINT OF LAW RESERVED.—*See* PERSON IN AUTHORITY.

POLICE.—*See* ILLEGAL ARREST.

POLICE PROHIBITION.—

Sec. 27 of Bombay Act VII. of 1867 does not empower the Police to prohibit the use of music in private houses. *Reg. v. Lukhmi Chango* 135

POSSESSION.—*See* MORTGAGE WITHOUT POSSESSION, 2. REGISTRATION, 2, 3.

POSSESSION BY MORTGAGEE.—*See* MORTGAGE WITHOUT POSSESSION, 1.

POUND-KEEPER.—

Where a Magistrate convicted, under Section 27 of Act I. of 1871, a person who was not himself a pound-keeper, but was merely entertained by the police Pátíl, who was *ex-officio* pound-keeper under Section 6 of the Act.

The High Court annulled the conviction and sentence passed upon the accused. *Reg. v. Vaktá valad Lákhú* 164.

POWER OF ATTORNEY TO REGISTER.—*See* STAMP.

POWER OF DISTRICT MAGISTRATE TO DIRECT RETRIAL.—

Where a Sub-Magistrate discharges a person accused of an offence not being an offence specified in the seventh column of the schedule to the Criminal Procedure Code as triable by the Court of Session only, or by the Court of Session or Magistrate of the District,

the District Magistrate has no power to direct a retrial under the provisions of Section 435 of the Code of Criminal Procedure. *Reg. v. Subháná bin Ganu*.....169

POWER OF SESSIONS COURT TO DIRECT COMMITTAL—

After an accused person has been acquitted under Sec. 255 of the Code of Criminal Procedure, it is not competent to the Session Judge to interfere under Sec. 435 of the same Act. *Reg. v. Venku Narsá*170

PRACTICE.—*See* REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT. REVIEW OF DISTRICT JUDGE'S JUDGMENT AFTER ADMISSION OF SPECIAL APPEAL. REVIEW OF JUDGMENT. SERVICE WATAN LAND.

PRACTICE IN CRIMINAL TRIALS.—*See* PERSON IN AUTHORITY.

PRACTICE IN INSOLVENT COURT.—*See* NOTES OF EVIDENCE NOT TAKEN.

PRESCRIPTION.—*See* IMMOVEABLE PROPERTY, 2.

PRESCRIPTIVE RIGHT.—*See* IMMOVEABLE PROPERTY, 2.

PRIORITY.—*See* REGISTRATION, 1, 3.

PRIVACY, INVASION OF—

Where the plaintiff opened a new window in his house at Dharwar, which rendered the defendant's house less private than before:—

Held that the plaintiff was not guilty of any tortious act, and should not be debarred from improving his own house, though the effect might be, to some extent, prejudicial to his neighbour.

To establish such an exceptional privilege, as is customary in this respect in the towns of Guzerat, evidence of the most satisfactory character is necessary. *Shrinivás Uđpirá v. L. Reid and others*. 266

PRIVATE HOUSE, MUSIC IN.—

See POLICE PROHIBITION.

PROCEDURE.—*See* APPEAL TO PRIVY COUNCIL. ASSIGNMENT OF DECREE, 1, 2. NEXT FRIEND OF MINOR, SUIT BY.

PROCEEDING IN THE NATURE OF A SUIT.—*See* AWARD.

PUBLIC SERVANT—

The refusal of a cart-owner to give his cart on hire to a Government officer does not constitute the offence of obstructing a public servant in the discharge of his public functions within the meaning of Sec. 186 of the Indian Penal Code. *Reg. v. Dhori Kullán*.....165

PUNISHMENT FOR COMPOUND OFFENCE.—*See* HOUSE BREAKING IN ORDER TO COMMIT THEFT.

PURCHASER AT COURTS SALE.

Notwithstanding the *dicta* in the case of the *Bank of Hindustan v. Premchand Raichand* it must now be considered as settled law that a purchaser at a Court's sale (except in cases in which such sale is set aside for irregularity under Section 257 of the Code of Civil Procedure) is not entitled to a refund of his purchase money from the execution creditor in cases in which it turns out that the judgment debtor had no right, title or interest in the property sold as his.

Cases which decide that a person whose property has been wrongfully seized by the Court, or wrongfully seized and sold at a Court's sale, as that of the judgment debtor, is entitled to recover damages from the execution creditor, at whose instigation the property has been so seized or so seized and sold, reviewed. *Kálu bin Vasáji v. Dámodhar Govind*. 92

PURCHASER FOR VALUE.—*See* CREDITOR'S RIGHT TO FOLLOW ASSETS OF A DECEASED HINDU INTO THE HANDS OF A PURCHASER FOR VALUE.

PURCHASER FROM TALUKDAR.
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RAILWAY COMPANY'S LIABILITY TO PAY RATES.—See MUNICIPAL GROUND RATES.

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RATIFICATION.—See INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY.

RATING, PRINCIPAL OF.—See MUNICIPAL GROUND RATES.

RECOGNISED AGENT—

The *munim* of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognised agent of the owner of such firm within the meaning of Section 17, Cl. 2 of the Civil Procedure Code, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up.
His Highness Tukoji Mahārāj Holkar v. Pilambardās Nāranji
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REDEMPTION AFTER FIXED TIME HAS EXPIRED.—See MORTGAGE, 1.

REDEMPTION BY MORTGAGOR.
—See MORTGAGE, 2.

REFERENCE OF CASE BY MAGISTRATE F. P. TO SUBORDINATE MAGISTRATE—

A Full-Power Magistrate has no authority to refer for disposal to a Subordinate Magistrate a complaint made originally to such Full-Power Magistrate. *Reg. v. Pápidio Muthdo*167

REGISTRATION—

1. A subsequent registered certificate of sale of immoveable property by the Court does not take precedence over a prior unregistered deed of sale of the same property where the registration of

such unregistered deed is optional under the provisions of the Act. *Lakhmichand and Walchand v. Kastur Bechar*60

2. On the 15th of December 1863, H. purchased from D. for valuable consideration two fields in the Sátára District (to which the provisions of Reg. IX. of 1827 and of Act XIX. of 1843, as to registration, were then applicable) and was duly put into possession of the fields. The deed of sale was not registered.

On the 14th of February 1864 D. mortgaged by a registered mortgage the same two fields to B. who then knew that H. was in possession of the fields as purchaser.

Held that, according to the true construction of Reg. IX. of 1827, Sec. VI., Cl. I., the title of H. having been completed by possession, there was no property in the fields left in D. to mortgage to B., and that, therefore, H. (the purchaser) had a better title to the fields than B. the mortgagee.

Sembla. The effect would have been the same under the provisions of Act XVI. of 1864 or Act XX. of 1866.

History of Registration given, and the provisions of different enactments relating to registration compared and discussed. *Bákrám Nemchand v. Appá valad Dulu and others*121

3. An unregistered deed of sale accompanied by immediate possession ought to be preferred to a subsequent registered certificate of a Court's sale or to a subsequent deed unaccompanied by possession. *Manmal valad Suratmal v. Dashrath valad Náráyan.* 147

4. A document, which is substantially a surrender by a tenant of his interest in land to his landlord,

- and, as such, is exempted from stamp duty by Act X. of 1862 under the general exemption clause, does not require registration under Act XVI. of 1864, Sections 13 and 14. *Jidav Rughnath v. Raji Himmat*246
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- REGISTRATION ACT, POWER OF ATTORNEY UNDER.—***See* STAMP.
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- REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT.—**
- Where an opposing creditor being, without any default on his part, misled as to the time when an Insolvent's petition was to come on for hearing, failed to appear when the petition was called on and the Insolvent obtained his discharge *ex parte*, the Appellate Court, on the ground that the opposing creditor had been taken by surprise, set aside the order of discharge and restored the case to the board.
- Seem* that, under the circumstances, the Commissioner sitting in Insolvency had no jurisdiction to set aside the order of discharge. *Dwarkanath Lalubhai and another v. George Blackwell*319
- REMISSION OF PUNISHMENT.—**
See VIOLATION OF CONDITIONS OF REMISSION OF PUNISHMENT.
- REPRESENTATION OF MINOR IN A SUIT.—***See* AWARD.
- RES JUDICATA.—***See* SUIT HEARD AND DETERMINED. TALUKDARI VILLAGE.
- RESTITUTION OF CONJUGAL RIGHTS—**
 A decree for restitution of conjugal rights under the Parsee Marriage and Divorce Act is enforceable only in the manner provided in Section 36 of the Act; such provision is in substitution of, and not in addition to, the ordinary remedies provided by Sec. 200 of the Code of Civil Procedure. *Ardesar Jehungir Framji v. Avabai*. 290
- RETRACTING CONFESSION.—**
See CONFESSION.
- RETRIAL.—***See* POWER OF DISTRICT MAGISTRATE TO DIRECT RETRIAL.
- REVIEW OF DISTRICT JUDGE'S JUDGMENT AFTER ADMISSION OF SPECIAL APPEAL—**
 After a special appeal had been admitted, the special appellant withdrew it with permission to apply for a review of the Lower Appellate Court's judgment. The

District Judge refused to grant a review on the ground that the admission of the special appeal was a bar to his doing so.

The High Court, to remove the difficulty raised by the District Judge, reviewed and cancelled its own order admitting the special appeal and directed that a review (which, it considered, the District Court had now power to grant) should be again applied for. *Naráyan bin Suloji v. Dándbhái valad Fatebhái*238

REVIEW OF JUDGMENT—

As a general rule the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal.

Whether this is so when such new evidence might affect the jurisdiction of the Court which tried the case—*Quere*.

When new evidence is discovered, the proper course for the appellant to adopt is to ask leave to withdraw his special appeal, and to apply to the lower Court for a review of its judgment. *Nání-bhái Vallabhás v. Náthábhái Haribhái*89

REVIEW OF ORDER REMOVING NUISANCE.—*See* JUDICIAL PROCEEDING.

SALE IN REEXECUTION OF DECREE.—*See* PURCHASER AT COURT'S SALE.

SALE, UNREGISTERED, WITH POSSESSION.—*See* REGISTRATION, 2.

SEAL ON WARRANT.—*See* WARRANT.

SEQUESTRATION.—*See* INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY.

SERVICE, CONTRACT OF.—*See* BREACH OF CONTRACT OF SERVICE.

SERVICE WATAN LAND—

Where land belonging to a service Watan held on a tenure of successive life estates had passed out of

the possession of the Watandárs:—*It was held* that a cause of action to recover such land accrued to each successive life tenant upon the death of his predecessor. *Kuria bin Hanmiá v. Gururáv and others*282.

SHARES, CALLS ON.—*See* INSOLVENT TRADER.

SIGNATURE ON WARRANT.—*See* WARRANT.

SIX YEARS' LIMITATION.—*See* LIMITATION, 4.

SMALL CAUSE COURT—

The Court of Small Causes has an equitable jurisdiction only in the cases specified in Sec. 32 of Act IX. of 1850, as the provisions of Sec. 2 of Act XXVI. of 1864 do not extend the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree. *Bái Jadáv v. Tribhuvandás Jagjivandás and another*333

See MAINTENANCE OF DESERTED WIFE.—

SMUGGLED OPIUM.—*See* OPIUM LAWS. OPIUM SMUGGLED.

SPECIAL APPEAL.—*See* REVIEW OF DISTRICT JUDGE'S JUDGMENT AFTER ADMISSION OF SPECIAL APPEAL. REVIEW OF JUDGMENT.

SOVEREIGN PRINCE.—*See* INDEPENDENT SOVEREIGN'S PRIVATE PROPERTY.

STAMP—

For a power of attorney executed under the provisions of Section 33 (a) of the Indian Registration Act of 1871 (Act VIII. of 1871) a stamp of 8 annas is sufficient under Article 13, Schedule II. of the General Stamp Act (No. XVIII. of 1869). *In re Keshav Kásináth*43

STAMP, DOCUMENT NOT REQUIRING.—*See* REGISTRATION, 4.

STATUTE OF FRAUDS—See MORTGAGING.

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SUBORDINATE MAGISTRATE, REFERENCE TO.—See REFERENCE OF CASE BY MAGISTRATE, F. P., TO SUBORDINATE MAGISTRATE.

SUIT HEARD AND DETERMINED—

In 1864 the original plaintiff, Lakhá Jivan, as heir of Fakira, brought

a suit against Jánki, the guardian of Fakira, Jivan Jivráj, Jivan Bhulá and Vallabh Bhulá, to recover a piece of land. The suit was rejected, as it was proved that (though the plaintiff was the heir of Fakira) Fakira's guardian had mortgaged the land for necessary purposes to Vallabh Bhulá. The plaintiff then sued Vallabh Bhulá for redemption of the mortgaged premises.

Held that the second suit was not barred under Sec. 2 of the Code of Civil Procedure.

Held also that the fact of the document under which Vallabh Bhulá held the land being described in the Court's judgment in the earlier suit as an instrument of sale, was not conclusive in the second suit as to the real nature of the instrument. *Vallabh Bhulá v. Rámá* 65

SUPERINTENDENCE BY HIGH COURT.—See EXTRAORDINARY JURISDICTION OF HIGH COURT.

SURPRISE, OPPOSING CREDITOR TAKEN BY.—See REINSTATEMENT OF PETITION ON LIST OF INSOLVENT COURT.

SURRENDER BY A TENANT TO HIS LANDLORD.—See REGISTRATION, 4.

TALUKDARI VILLAGE—

Held that the *talukdari* Act (Bombay Act VI. of 1862) did not affect *talukdari* villages, the right, title and interest of the *Tálukdár* in which had been sold before that Act came into operation, though possession of such villages had not then been obtained by the purchaser.

S., the mortgagee of a *talukdari* village, obtained a decree upon his mortgage against his mortgagor, the *talukdar* of the village, under which S. attached the village. The Collector of the District, in

which the attached village was situated, thereupon came in under Section 246 of the Civil Procedure Code, and sought to raise the attachment, but, as he failed to appear when the matter came on for adjudication, his application was dismissed.

The village was then sold under the decree and was purchased by S., the mortgagee.

Upon S. seeking to obtain possession of the village, he was resisted by the Collector, whereupon S. (after proceedings ineffectually taken by him under Sec. 269 of the Code) filed a suit against the Collector praying to be put in possession of the village:—

Held by the Appellate Court (affirming the decision of Tucker, J.) that the right of S. to be put in possession of the village was, as between him and the Collector, *res judicata* by reason of the dismissal of the Collector's application under Sec. 246 of the Code (to set aside which dismissal the Collector had not filed a suit within the year allowed for that purpose), and that S. ought, therefore, to have been at once put in possession of the village without further proof of his title.

As to the right of *Talukdars* in the Ahmedabad Zilla to alienate their *talukdari* villages—*Quere. The Collector of Ahmedabad v. Salmaldas Becharas*205

TENANTS FOR LIFE.—*See* SERVICE WATAN LAND.

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TRAVELLING AUDITOR. — *See* PERSON IN AUTHORITY.

TRUSTEE.—*See* LIABILITY OF TRUSTEE FOR BREACH OF TRUST.

ULTRA VIRES—

If an enactment be partly *ultra vires*, and the bad part be divisible from the good, the latter must be regarded as valid and pending216

UMPIRE.—*See* ARBITRATION.

UNENCLOSED LAND.—*See* LIMITATION, 2.

UNLAWFUL COMMITMENT TO CONFINEMENT.—*See* ILLEGAL ARREST.

VAKIL'S COSTS.—*See* COSTS AS BETWEEN PLEADER AND CLIENT.

VIOLATION OF CONDITIONS OF REMISSION OF PUNISHMENT.

A person convicted by the Recorder's Court of Prince of Wales's Island, Singapore, and Malacca, of the crime of Burglary, and sentenced to transportation for ten years, at a place to be appointed by the Governor General of India in Council, was released from the Ratnagiri jail on a ticket-of-leave after having been in confinement for more than eight years. At Kárwár he committed theft in a dwelling house before his sentence had expired.

Held that the Full Power Magistrate at Kárwár had jurisdiction to try the convict for the offence of violation of the condition of remission of punishment under Section 227, Indian Penal Code. *Reg. v. Ahone Akong*356

WAIVER. — *See* APPOINTMENT OF THIRD ARBITRATOR UNDER SEC. 12 OF ACT VI. OF 1857. 177

WAKF—

Although, according to Muhammadan law, the founder of a *Wakf* has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (e. g., from amongst his relations), he cannot after-

wards name a person as manager not answering the proper description.

After the death of the founder, the right to nominate a manager of the *Wakf* vests in the founder's vakils or executors, or the survivor of them for the time being.

The term *Akriba* (relations), though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity.

The wife or widow of the founder is not included amongst his *Akriba*. *The Advocate General v. Fatimā Sultāni Begam and another*.....19

WARRANT—

A warrant issued under Section 76 of the Code of Criminal Procedure should be sealed, should describe the person to be apprehended under it with reasonable particularity so that there may be no difficulty in establishing his identity, and should be subscribed

with the name and full official title of the Magistrate issuing it.

Where a warrant was defective in all the above particulars the prisoner apprehended under it was released by the High Court. *In re James Hastings*154

WATAN HELD FOR SERVICE.—
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